01-3063

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 01-3063-CR

vs.

Trial No. 99-CF-1096

WAYLON PICOTTE,

Defendant-Appellant.

Appeal from a Judgment and Order of the Circuit Court of Brown County, Honorable William C. Griesbach and Peter J. Naze, Circuit Judges, Presiding Circuit Court Case Number 99-CF-1096

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

1. Whether the year-and-a-day rule is part of the common law of Wisconsin. The trial court assumed that the rule was part of Wisconsin's common law without explicitly so finding.

2. Whether the legislature altered or suspended the year-and-a-day rule by enacting a statute of limitations on homicide. The trial court found that if the year-and-a-day rule was part of Wisconsin's common law, the legislature altered the rule by enacting Wis. Stat. §939.74(2), a statute of limitation on homicides which created a conflict with the common law rule.

3. Whether a court may abrogate the ancient common law year-and-a-day rule after the legislature specifically declines to do so. The trial court did not address this issue

4. Whether, if the court concludes that it can and should abrogate the year-and-a-day rule, it must still grant relief to Mr. Picotte. The trial court did not address this issue.

STATEMENT OF THE CASE

Defendant-Appellant Waylon J. Picotte was involved in a fight outside a bar in Green Bay on September 26, 1996. During the altercation John Jackson was struck in the face and hit his head on a brick wall, causing brain damage which left him in a coma. Mr. Picotte was charged with one count of aggravated battery based on the injuries to Mr. Jackson and one count of substantial battery based on the injuries sustained by another person involved in the melee. Mr. Picotte entered guilty pleas to these two counts and was sentenced to an aggregate sentence of 15 years imprisonment. This conviction and sentence is not the subject of this appeal.

On June 8, 1999, nearly three years after the fight, Mr. Johnson died. Mr. Picotte was charged with one count of first degree reckless homicide as a party to the crime in violation of Wis. Stats. §940.02(1) and §939.05. The case before the Honorable William C. Griesbach, Brown County Circuit Court Judge, for a jury trial. Mr. Picotte was convicted and sentenced to 30 years imprisonment to be served concurrently to the sentences in the prior battery case and with credit for time served on that case.

Mr. Picotte filed postconviction motions which included an assertion that his conviction was barred because it violated the common law "year-

and-a-day" rule which established an irrebutable presumption that if the death occurs more than 366 days after the defendant's act, the defendant's act did not cause the death. Mr. Picotte attached an affidavit to this postconviction motion in which Mr. Picotte's trial counsel stated he was not aware of the "year-and-a-day" rule. In a written decision, the Honorable Peter J. Naze denied this motion on the ground that the legislature had abrogated the "year-and-a-day" when it enacted a statute of limitation for homicide.

Mr. Picotte appealed from his conviction and the denial of his postconviction motion. The Court of Appeals requested that the Supreme Court certify the case. The Supreme Court granted direct review upon certification.

ARGUMENT

I. The "year-and-a-day" rule is part of the common law of Wisconsin

When Wisconsin joined the Union in 1848, the common law which had been in force in the Wisconsin territory was preserved in the Wisconsin Constitution:

> Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

Wisconsin Constitution Article XIV, Section 13. The reference to "such parts of the common law" in this constitutional provision refers to the law arising from English court decisions rendered prior to the Revolutionary War. *Davison v. St. Paul Fire & Marine Ins. Co.*, 75 Wis.2d 190, 248 N.W.2d 433, 439-40 (1976) (citing cases). Thus, the English common law as existed in 1776 became part of the law upon Wisconsin's statehood.

The year-and-a-day rule originated in the Statute of Gloucester in 1278 and was incorporated into English Common Law. *See*, Donald E. Walther, *Taming a Phoenix: the Year-and-a-Day Rule in Federal Prosecutions for Murder*, 59 U. Chi. L. Rev. 1337 (1992) (providing an historical analysis of the evolution of the year-and-a day rule). "At common

law . . . there is no homicide unless the victim dies within a year-and-a-day after the injury was inflicted. If the interval exceeds a year-and-a-day, it is conclusively presumed that the injury did not cause the death." 2 Torcia, *Wharton's Criminal Law*, §118, pp. 151-152 (15th Ed. 1994). In an early case, the United States Supreme Court recognized the year-and-a-day rule as part of the common law:

> In cases of murder the rule at common law undoubtedly was that no person should be adjudged "by any act whatever to kill another who does not die by it within a year and a day thereafter; in computation whereof the whole day on which the hurt was done shall be reckoned first." 1 Hawkins, Pleas of the Crown, ch 13; 2 Hawkins, Pleas of the Crown, ch 28, § 88; 4 Blackstone, Commentaries, pp 197, 306. The reason assigned for that rule was that if the person alleged to have been murdered "die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death; and in case of life, a rule of law ought to be certain." 3 Coke, Institutes of the Laws of England, p 53.

Louisville, E. & St. L.R. Co. v. Clarke, 152 U.S. 230, 239, 14 S.Ct. 579, 581, 38 L.Ed. 422, 424 (1894). In Wisconsin cases, the rule has never been discussed except in a case arising from territorial times. *Mau-zau-mau-ne-kah v. United States*, 1 Pin. 124 (Wis. 1841). However, recent decisions in sister states have acknowledged the pedigree of the rule as being part of the common law. *See, e.g., People v. Stevenson*, 416 Mich. 383, 331 N.W.2d

143, 145 (1982) ("The year and a day rule is well established within the tradition of the common law, dating back as early as 1278."); *State v. Ruesga*, 619 N.W.2d 377, 380 (Iowa 2000) ("Both parties concede that "a year and a day" formed a recognized part of the English common law dating back to the thirteenth century"). Thus, the rule became part of Wisconsin law upon its achieving Statehood.

II. The legislature did not alter or suspend the year-and-a-day rule by enacting a statute of limitations on homicide

In its decision denying the postconviction motion, the trial court found that by enacting Wis. Stat. §939.74(2) which provides that homicide prosecutions "may be commenced at any time", the legislature had abrogated the year-and-a-day rule. However, this statute of limitations is different from, and does not conflict with, the year-and-a-day rule:

> The rule is not a statute of limitations. A statute of limitations sets the time within which the prosecution can be commenced after the crime has been completed. The year-and-a-day rule provides that the crime is not committed unless the death occurs within a year-and-a-day after the accused's act. In other words (in a criminal prosecution) death cannot be attributed to a blow or other harm which precede it by more than a year-and-a-day. "In such case the loss of life is attributed to natural causes rather than to the human act which occurred so long ago." Perkins, Criminal Law (2nd ed. 1969) 28. Thus, if death ensues more than a year-and-a-day from the act of the accused, there is a conclusive presumption that the death was not caused

> by that act. On the other hand, if death occurs within a year-and-a-day of the act, the rule does not bar a prosecution brought any time during the life of the offender.

State v. Brown, 21 Md.App. 91, 318 A.2d 257, 259 (1974).

Moreover, creation of a statute of limitation for homicide could not be deemed to alter or suspend the year-and-a-day rule, since Wisconsin never had a limitation on homicide prosecutions, even in territorial times. *See*, *Statutes of the Territory of Wisconsin*, p. 374 (1839). Merely continuing a provision allowing prosecution for murder at any time during the life of the offender could have no effect on the year-and-a-day rule. The common law rule did not act to limit the time prosecutions can be brought, but rather addressed when a homicide is deemed to have been committed. Thus, the legislature did not, by enacting (or continuing) a provision regarding when prosecution may be brought, alter or suspend the year-and-a-day rule.

III A court may not abrogate the ancient common law year-and-a-day rule after the legislature specifically declines to do so

The Wisconsin Constitution provides:

> Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

Constitution of Wisconsin, Article XIV, §13. When interpreting this provision, distinction must be drawn between the generic common law (which includes all judicially expounded law) and the "common law now in force." This latter phrase encompassed "only that part of the common law which was in existence at the time of the American Revolution and adopted in the territory. . . ." *Bielski v. Schulze*, 16 Wis.2d 1, 11, 114 N.W.2d 105, 110 (1962) (citing *Coburn v. Harvey*, 18 Wis. 147, 148 (1864)). Thus, English case law from *after* the Revolutionary War is *not* part of the common law of Wisconsin adopted by the Wisconsin Constitution. *Bielski v. Schulze*, 16 Wis.2d at 11, 114 N.W.2d at 110 (citing *Cawker v. Dreutzer*, 197 Wis. 98, 133, 221 N.W.2d 401 (1928)). The court in *Bielski* was considering whether it could modify the tort law doctrine of contribution. The court found that no English common law from before 1776 or Wisconsin territorial common law from prior to 1848 controlled the issue. In light of this finding, the court found that Article XIV, §13 did not prohibit altering the rule of contribution. In cases subsequent to *Bielski*, however, courts considering the whether Article XIV, §13 prohibited alteration of a common law rule sometimes failed first to determine whether the common law rule at issue is encompassed by the constitutional

provision. Common law doctrines not arising from English cases preceding 1776 or from Wisconsin territorial cases are not part of the common law in force at the inception of the Wisconsin Constitution. Therefore, the such later common law doctrines are not constitutionally required to "continue [as] part of the law of this state until altered or suspended by the legislature."

In *State v. Esser*, the Wisconsin Supreme Court determined that the definition of "insanity" in criminal cases was not part of the common law which was continued at the time of statehood. 16 Wis.2d 567, 573-579. 115 N.W.2d 505, 508-512 (1962). The court reached this conclusion only after a lengthy review of English authority. While the insanity defense was recognized by early English cases, various definitions of insanity had been used. The court concluded that the cases it reviewed "make it improbable that the right-wrong definition as an exclusive test had been a well-recognized rule since territorial days." 16 Wis.2d at 579, 115 N.W.2d at 512.

Based on the above, the court in *Esser* could conclude that since the definition of insanity was not incorporated by Article XIV, §13, that constitutional provision did not affect the court's power to alter the

definition. Such a conclusion would allow the court to retain or modify the definition of insanity pursuant to modern common law rules as tempered only by the principle of *stare decisis*. Rather than so conclude, however, the court in *Esser* expounded on the need for flexibility and elasticity in applying common law. The court then reached the remarkable and entirely unnecessary conclusion that the unambiguous words of the Wisconsin Constitution (". . . until altered or suspended by the legislature . . .") did not mean what they say and that a Wisconsin court, in addition to the legislature, could abrogate the common law. Despite acknowledged authority citing Article XIV, §13 as a ground for applying particular doctrines of the common law, the court asserted that "these decisions do not commit this court to retention of every common-law rule developed before 1776 or 1848." 16 Wis.2d at 583, 114 N.W.2d at 514.

The authority which the court in *Esser* declined to follow was extensive and longstanding. 16 Wis.2d at 583, 114 N.W.2d at 514 (footnote 35, listing cases). As noted, the definition at issue did not originate in the common law as adopted by Article XIV, §13. Therefore, the assertion that the words of this constitutional provision were not binding on the court was superfluous to the court's holding. *Esser* was wrongly decided and should

be overruled insofar as it purports to allow a court, and not just the legislature, to alter or suspend the common law as adopted upon statehood.

Even if this court should uphold *Esser's* dictum that a court may abrogate a common law rule, this court may not abrogate the year-and-a day rule in this case, as the legislature has explicitly refused to adopt such a change. In its brief before the court of appeals, the State established that the legislature considered abolishing the year-and-a-day rule when revising the criminal code, but made a policy decision not to do so. The 1953 revision of the Wisconsin Criminal Code contained the following provision:

> 339.15 YEAR AND A DAY RULE ABOLISHED. In a prosecution for homicide the state must prove beyond a reasonable doubt the causal relation between the homicidal act and death, but shall not be required to prove that death occurred within a year and a day of such act.

5 Wisconsin Legislative Council, *Judiciary Committee Report on the Criminal Code*, at 10 (1953). This provision never went into effect because the act passing it required that it be reenacted by the 1955 legislature, which was never done. See, William A. Platz, *The Criminal Code*, 1956 Wis. L. Rev. 350, 351-352. The 1955 version of the Criminal Code did not include the provision abolishing the year-and-a-day rule. William Platz, one of the architects of both the 1953 and 1953 revision of the Criminal Code,

explained:

> Another section deleted by the committee [that revised the 1953 revision of the Criminal Code and produced the 1955 version of the Criminal Code that the legislature passed] would have abolished the rule in homicide cases that death must occur within a year and a day from the felonious act of causing death. This was a policy decision by the committee and leaves the law as it has been.

Platz, 1956 Wis. L. Rev. At 363 (footnotes omitted).

"When acting within constitutional limitations, the Legislature settles and declares the public policy of a state and not the court." *Hengel v. Hengel*, 122 Wis.2d 737, 742, 365 N.W.2d 16 (Ct. App. 1985) (citing *Borgnis v. Falk Co.*, 147 Wis. 327, 351, 133 N.W. 209 (1911)). The legislature, not the courts, determines the public policy of Wisconsin." *In re Commitment of Sorenson*, 2001 WI App 251, ¶41, 248 Wis.2d 237, 735 N.W.2d 787, 796 (citing *Rice v. City of Oshkosh*, 148 Wis.2d 78, 91, 435 N.W.2d 252 (1989)).

In the instant case, the legislature considered abolishing the year-and-a-day rule and decided as a matter of policy not to do so. This Court should not second guess the legislature's policy choice. Failure of the legislature to pass a bill to modify the construction of a statute indicates a legislative approval of the existing construction. *Cook v. Industrial Comm'n*, 31

Wis.2d 232, 243, 142 N.W.2d 827, 833 (1966).

In *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957) the Wisconsin Supreme Court was confronted with a labor union that barred Blacks from membership. The legislature had adopted a statute which discouraged racial discrimination under such circumstances, but which provided no remedy to those denied membership because of race. Excluded union applicants sought a remedy from the Supreme Court. The Court observed that in the original bill the Industrial Commission was given the power to order violators to cease and desist and gave the courts power to review and to enforce such orders. However, those provision were deleted from the bill that ultimately passed, and efforts to include such enforcement mechanisms were defeated in subsequent legislative sessions. *Ross*, 275 Wis. At 529, 82 N.W.2d at 318-319.

The plaintiffs in *Ross* asked the courts to provide them the relief that was explicitly stricken by the legislature. The Supreme Court responded to this request as follows:

> We are convinced that the legislature purposely denied enforcement provisions in the Fair Employment Code and for us to restore what the legislature struck out would be legislation, not interpretation or construction of the statute. And here there could be no pretense that the court is reading

> into the statute something consonant with the intent of the legislature but left out through inadvertence or lack of foresight. The statute's history up to the last legislative session emphasizes that there is more to contend with her than an inadvertent omission. The principle of compelling compliance with the purpose of the legislation has been three times intentionally rejected. A clearer declaration of a non-compulsory public policy is hard to imagine. For the court to read into the statute that which the legislature has thrice refused to include would be not only a reversal of the legislative intent but a gross invasion of the legislative field in order to do so.

Ross, 275 Wis. at 529-530, 82 N.W.2d at 319.

This is exactly what the Attorney General asks this Court to do in this case. The legislature considered, and rejected, abrogation of the year-and-a-day rule. Thus, this case differs significantly from cases where courts considered abrogating rules where no such legislative intent was evident. *Cf.*, *State v. Esser*, 16 Wis.2d 5676, 115 N.W.2d 505 (1962); *State v. Hobson*, 218 Wis.2d 350, 577 N.W.2d 825 (1998). If a Wisconsin court is now free to make its own policy findings, and to take the precise action the legislature declined to take, the judicial branch would be setting itself up as a super legislature. As the Wisconsin Supreme Court has said:

> We may differ with the legislature's choices . . . but must never rest our decision on that basis lest we become no more than a super-legislature. Our form of government provides for one legislature, not two. It is for the legislature to make policy choices, ours to judge them based not on our preference but on

> legal principles and constitutional authority. The question is not what policy we prefer, but whether the legislature's choice is consistent with constitutional restraints.

Flynn v. Department of Administration, 216 Wis.2d 521, 528-529, 576 N.W.2d 245, 248 (1998). A court may not "say if the legislature knew then what we know now, they would have done differently, and proceed to substitute such different law for the one actually enacted by the legislature." *Dickhut v. Norton*, 45 Wis.2d 389, 403, 173 N.W.2d 297, 304 (1970).

The Wisconsin legislature could prospectively abrogate the common law rule prohibiting any prosecution for homicide in which the death occurs more than a year and one day after the act causing injury. The legislature could also modify the rule. *See, e.g., State v. Edwards*, 104 Wash.2d 63, 701 P.2d 508 (1985) (year-and-a-day rule modified by statute to three years and one day). The point is, however, that the legislature has refused to do so. For a court to abrogate the common law rule would be an improper exercise of judicial power and would be inconsistent with the separation of powers between the legislative and judicial branches. Nothing prevents the legislature from revisiting this issue and, if the legislature deems that change in policy is appropriate, prospectively abolishing the year-and-a-day rule by legislation. This appeal, however, is not the appropriate forum to

reconsider this policy.

IV. Even if the court concludes that it can and should abrogate the common law year-and-a-day rule, it must still grant relief to Mr. Picotte

At the time of Mr. Picotte's act resulting in this case, and at the time of his trial, the year-and-a-day rule was part of the law of Wisconsin. It barred his prosecution for homicide. Even should this court determine that it can and should abrogate the rule, it must do so prospectively and grant Mr. Picotte relief from his conviction.

To deny Mr. Picotte relief would subject him to an *ex post facto* law in violation of Article I, §12 of the Wisconsin Constitution. *State v. Hobson*, 218 Wis.2d 350, 381, 577 N.W.2d 825, 838 (1998). While the *ex post facto* clause applies only to legislative enactments, a defendant's due process rights prohibit the retroactive application of judicial decisions under an analysis identical to that under the *ex post facto* clauses of the state and federal constitutions. *State v. Kurzawa*, 180 Wis.2d 502, 510-511, 509 N.W.2d 712, 715 (1994).

The United States Supreme Court has recently rejected an *ex post facto* argument under the U.S. Constitution in circumstances similar to those in the instant case. *Rogers v. Tennessee*, 532 U.S. 451 (2001). Of course, the

court in *Rogers* did not and could not construe the Wisconsin Constitution. The Wisconsin Supreme Court is the "final arbiter" of questions arising under the Wisconsin Constitution. *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶25, 639 N.W.2d 537, 544. The Wisconsin Constitution may afford greater protection than the U.S. Constitution. *State v. Hansford*, 219 Wis.2d 226, 242, 580 N.W.2d 171 (1998).

Article XIV, §13 of the Wisconsin Constitution gives Mr. Picotte the constitutional right to the protection of the common law. Such protection can not be retroactively abrogated. As Justice Scalia's dissent in *Rogers* makes clear, the retroactive change in the common law violates a defendant's right to due process of law. *Rogers v. Tennessee*, 532 U.S. at 468-471 (Scalia, J., dissenting).

While Justice Scalia was writing for a four justice minority of the Court, there is a critical difference between *Rogers* and the instant case, which makes Justice Scalia's reasoning applicable here. Mr. Rogers had no statutory or state constitutional right to the application of the common law. The state court was operating entirely as a common law court, without any legislative or constitutional direction. *State v. Rogers*, 922 S.W.2d 393 (Tenn. 1999). Here, Mr. Picotte has a state constitutional right to the

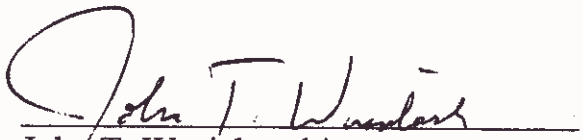
application of the common law, in the absence of legislative action to abrogate such right. In *Rogers*, Justice O'Connor pointed out that the Tennessee court decision abrogating the common law rule "involve[d] not the interpretation of a statute but an act of common law judging." *Rogers*, 532 U.S. at 461. In contrast, Mr. Picotte's common law right arises from a state constitutional provision, and not merely form and act of common law judging.

Defendant is aware of no case in which this Court, or any other Court, has retroactively abrogated an acknowledged constitutional right. In *Esser*, the State was arguing that the common law not be changed. In *Hobson*, the Court explicitly refused to apply the law retroactively to the defendant before the court. Whatever this court may decide regarding the prospective application of the year-and-a-day rule, Mr. Picotte is entitled to its protection as provided by the Wisconsin Constitution. His conviction must be set aside.

CONCLUSION

Waylon Picotte asks that the Court reverse the judgment and order of the Circuit Court of Brown County and remand with directions to dismiss the homicide information with prejudice and to credit Mr. Picotte's aggravated battery sentence with all of the time served on the homicide conviction.

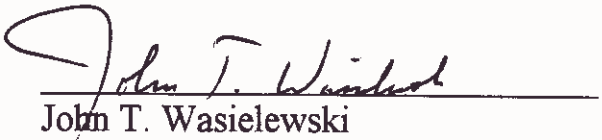
Respectfully submitted,



John T. Wasielewski
Attorney for Waylon Picotte

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. the length of this no-merit brief is 3859 words.



John T. Wasielewski

APPENDIX CONTENTS

TE OF WISCONSIN | CIRCUIT COURT BRANCH 4 | BROWN COUNTY

State vs Waylon J Picotte

Date of Birth:

Judgment or Conviction

Sentence to Wisconsin State Prisons

Case No.: 99CF001096

The defendant was found guilty of the following crime(s):

Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1st-Degree Reckless Homicide [939.05 Party to a Crime]	940.02(1)	Not Guilty	Felony B	09-28-1996	Jury	11-08-2000

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	01-12-2001	State Prisons	30 YR	Waupun as reception center Concurrent with present sentence Credit for time served is 4 yrs & 108 days (9/28/96 - 1/12/01)	DOC
1	01-12-2001	Forfeiture / Fine			

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
10.00	20.00				70.00		

IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

BY THE COURT:

William Griesbach, Judge
Wendy Wiggins Lemkuil , District Attorney
Ralph J Sczygelski, Defense Attorney

Court Official

1-12-01
Date

STATE OF WISCONSIN | CIRCUIT COURT BRANCH V | BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

WAYLON J. PICOTTE,

Defendant.

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FILED
OCT 31 2001
PAUL G. JANQUART
CLERK OF COURTS
BROWN COUNTY, WI

DECISION

Case No. 99 CF 1096

This case is before me on a § 809.30, Wis. Stats., post-conviction motion filed by the defendant, Waylon J. Picotte. The defendant moves to have his conviction vacated on the following grounds: (1) the prosecution violated the common law "year-and-a-day" rule; or (2) the Court erred as a matter of law by not instructing the jury on the lesser included offense of aggravated battery. In the alternative, the defendant seeks modification of his sentence from a term of 30 years to a term not to exceed 20 years.

Facts

Waylon Picotte and Dustin Teller attacked John Jackson on September 28, 1996. On October 21, 1996, Mr. Picotte was charged with substantial battery and aggravated battery. Mr. Picotte pleaded guilty to both charges and was sentenced to 10 years on the aggravated battery charge and a concurrent 5-year sentence on the substantial battery charge.

On June 8, 1999, over two-and-a-half years after the attack, John Jackson died from complications arising from the injuries he sustained during the attack. On November 22, 1999, the State charged Mr. Picotte with first degree reckless homicide – party to a crime. After a jury trial, Mr. Picotte was convicted of the charged offense and sentenced to 30 years imprisonment.

DISCUSSION

"Year-and-a-Day" Rule

At common law, the "year-and-a-day" rule provided that no defendant could be convicted of murder unless the victim had died within a year and a day of the defendant's act. *See Ball v. United States*, 140 U.S. 118, 133, 11 S.Ct. 761, 766, 35 L.Ed. 377 (1891). The rule's applicability to criminal prosecutions in this country was acknowledged by the United States Supreme Court in 1894 as follows:

> In cases of murder the rule at common law undoubtedly was that no person should be adjudged "by any act whatever to kill another who does not die by it within a year and a day thereafter...." And such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute.

Louisville, Evansville, & St. Louis R.R. Co. v. Clarke, 152 U.S. 230, 239, 14 S.Ct. 579, 581, 38 L.Ed. 422 (1894). No Wisconsin decision has directly addressed the applicability of the "year-and-a-day" rule. The only mention of the rule is by dicta in the pre-statehood case, *Mau-Zau-Mau-Ne-Kah v. The United States*, 1 Pin. 124 (1841).

Mr. Picotte argues that the "year-and-a-day" rule should apply in this case and his conviction for first degree reckless homicide should be vacated. In addition, Mr. Picotte argues that the "year-and-a-day" rule can only be abrogated or modified by the legislature and not the judiciary. To support his argument, Mr. Picotte cites Article XIV, Sec. 13 of the Wisconsin Constitution, which preserves the English common law as it existed at the time of the American Revolution until altered or suspended by the legislature.

The State contends that legislature has, in fact, abrogated the "year-and-a-day" rule by enacting § 939.10, Wis. Stats. Section 939.10, Wis. Stats. provides that "the common-law rules of criminal law not in conflict with Chapters 939 to 951 of the Wisconsin Statutes shall remain

in effect." The limitation on prosecutions for homicide created by the "year-and-a-day" rule, the State argues, directly conflicts with the time limitations found in § 939.74(2)(a), Wis. Stats. Because application of the "year-and-a-day" rule would not allow a prosecution under §§ 940.01, 940.02 or 940.03, Wis. Stats., to be commenced "at any time," the State argues that the "year-and-a-day" rule is in conflict with § 939.74(2)(a), Wis. Stats., and, thus, should not be applied in this case. Mr. Picotte's only argument relative to § 939.10, Wis. Stats., is that the "year-and-a-day" rule is not a statute of limitation.

Art. XIV Sec. 13, Wis. Const., provides that "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." (emphasis added). The legislature has altered the common-law with respect to this issue. Section 939.10, Wis. Stats., provides that "the common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved." Section 939.74(2)(a) states that "a prosecution under §§ 940.01, 940.02, or 940.03 may be commenced at any time." The constitution clearly allows that the legislature to alter or suspend parts of the common law not inconsistent with the constitution. Thus, assuming that the "year-and-a-day" rule even existed in Wisconsin after the adoption of its constitution, the legislature, by § 939.74(2) created a "conflict" with that common law rule. In other words, it altered the common law so as to permit prosecutions such as this. Therefore, the defendant's motion to vacate his conviction by application of the "year-and-a-day" rule must be denied.

Jury Instructions on Aggravated Battery

The defendant argues that he was entitled to jury instructions on aggravated battery as a lesser included offense of first degree reckless homicide. Section 939.66, Wis. Stats., provides that a defendant may be convicted of either the crime charged or an included crime, but not both.

An "included crime" may be a crime, which does not require proof of any fact in addition to that already required to be proved for the crime charged, or an included crime may be a crime, which is a less serious type of criminal homicide than the one charged. § 939.66(1) & (2), Wis. Stats. Aggravated battery requires the intent to cause bodily harm to that person or another without the consent of the person harmed. § 940.19(1), Wis. Stats. First degree reckless homicide, on the other hand, requires recklessly causing the death of another human being under circumstances which shows utter disregard for human life. § 940.02(1), Wis. Stats.

As the defendant admits, our Court of Appeals has already addressed this issue and held that aggravated battery is not a lesser included offense of a crime which requires recklessness. *See State v. Eastman*, 185 Wis. 2d 405, 413-415, 518 N.W.2d 257 (Ct. App. 1994); *State v. Karnowski*, 170 Wis. 2d 504, 510-11, 489 N.W.2d 660 (Ct. App. 1992). I am bound by these decisions. *See* § 752.41(2), Wis. Stats. Therefore, this motion must be denied.

Reduction in Sentence

The defendant argues that the trial judge abused its discretion at sentencing by not stating on the record specific reasons for his 30-year sentence. In *Ocanas v. State,* 70 Wis. 2d 179, 233 N.W.2d 457 (1975), our Supreme Court enunciated circumstances that might be an abuse of sentencing discretion: (1) failure to state on the record the relevant and material factors which influenced the court's decision; (2) reliance upon factors which are totally irrelevant or immaterial to the type of decision to be made; and (3) too much weight given to one factor in the face of other contravening considerations. *Id.* at 187.

A review of the record reveals that there is no evidence that Judge Griesbach misused his discretion in imposing a sentence. The record shows that he articulated his reasons for imposing sentence, considered proper factors, and properly balanced competing considerations.

With respect to the gravity of the offense, the judge observed that this offense involved the loss of human life, and that "there is hardly a greater crime than the taking of a human life." (Sent. Tr., p. 19, lines 23-24, p. 20, lines 7-8). Furthermore, the jury convicted the defendant of first degree reckless homicide and the court found that:

> ...I specifically instructed them that in order for them to find you guilty of first-degree reckless homicide, they would have to find that you acted with reckless disregard for human life, and they made that finding.
>
> The offense is a very, very serious one, and in fact, you were the leader in the offense. (Sent. Tr., p. 21, lines 23-25, p. 22, lines 1-4).

As to the character of the offender, the judge noted that the defendant described himself as being the leader in the attack. (Sent. Tr., p. 21, line 1). Furthermore, Judge Griesbach stated that the defendant's life has been marked by angry outbursts, including the night of the attack on Mr. Jackson (Sent. Tr., p. 21, lines 5-11) and noted that Mr. Picotte's prior convictions included armed robbery with a read-in offense of delivery of cocaine; retail theft and disorderly conduct; as well as fighting in school which caused him to be discharged. (Sent. Tr., p. 22, lines 7-12). In addition, the Court recognized Mr. Picotte's need for rehabilitation. (Sent. Tr., p. 23, lines 18-20).

In his brief, the defendant argues that:

> It is not clear what basis the court has for sentencing Mr. Picotte to a 25 percent longer sentence than Mr. Teller. The record fails to disclose such reason. The only obvious difference between this defendant and the co-defendant is that this man went to trial while the other man did not. (Defendant's brief p. 5)

The defendant's assertion is simply not accurate. In his sentencing remarks, Judge Griesbach said:

> Certainly, the danger that consumed you exploded that evening, and Mr. Teller joined in. He was a follower and he followed you and he also manifested the kind of rage that even you seemed to manifest earlier.

> I can't justify a lesser sentence than Mr. Teller received on the grounds that your involvement was less, because I do not believe that it was. (Sent. Tr., p. 21, lines 12-19).

The judge also discussed in some detail the defendant's substantial prior record vis à vis Mr. Teller's single prior adjudication. (Sent. Tr., p. 22, lines 4-12). Thus, Judge Griesbach properly exercised his sentencing discretion by clearly articulating his reasons for sentencing Mr. Picotte to a different term than that Mr. Teller received.

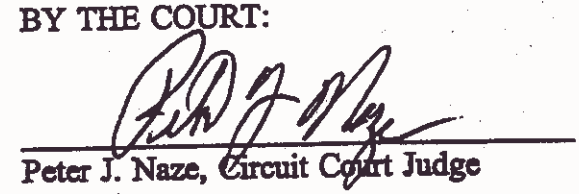
As to protection of the public, the judge stated that Mr. Picotte is not out "roaming the streets, hurting other people, looking for fights..." (Sent. Tr., p. 22, lines 20-22). The judge found that the defendant's prior record shows a need to protect the public, (Sent. Tr., p. 23, lines 6-8), and noted that Mr. Picotte's imprisonment had saved other people's lives. (Sent. Tr., p. 22, line 25).

Judge Griesbach articulated his reasons for imposing a sentence, considered proper sentencing factors, and exercised proper judicial discretion. For these reasons, the defendant's motion for sentence reduction, too, must be denied.

For the reasons set forth above, each of the defendant's post-conviction motions dated June 9, 2001, is **DENIED.**

DATED: October 31, 2001.

BY THE COURT:



Peter J. Naze, Circuit Court Judge

cc: John P. Zakowski, D.A.
Attorney Howard B. Eisenberg

STATE OF WISCONSIN | CIRCUIT COURT Branch 4 | BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 99-CF-001096

WAYLON J. PICOTTE,

Defendant.

AFFIDAVIT

Ralph J. Sczygelski, being first duly sworn on oath, respectfully deposes and states as follows:

1. I am an attorney licensed to practice law in the State of Wisconsin.
2. I was appointed by the State Public Defender to represent the Defendant in this case.
3. I am aware that Defendant's post-conviction counsel, Howard Eisenberg, has raised the issue of whether Defendant's prosecution and conviction for homicide in this case violated the common law "year and a day" rule.
4. I did not raise this issue at trial because I was not aware of the common law rule until brought to my attention by Mr. Eisenberg.
5. Had I been aware of the common law "year and a day" rule at the time of the trial in this case, I certainly would have raised the issue as a complete bar to the prosecution of the Defendant
6. I had no strategic reason for not raising this issue. The only reason I had for not

raising the issue is that I was not aware of the law on this point.

RALPH J. [illegible]CZYGELSKI

Sworn and subscribed to before me this 28th day of September, 2001.

Jennifer Burke-Krueger
NOTARY PUBLIC, STATE OF WISCONSIN

My Commission: expires 7/20/2003

STATE OF WISCONSIN

SUPREME COURT

Case No. 01-3063-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WAYLON PICOTTE,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS
OF AN APPEAL FROM A JUDGMENT AND ORDER
OF THE CIRCUIT COURT FOR BROWN COUNTY,
HONORABLE WILLIAM C. GRIESBACH AND
HONORABLE PETER J. NAZE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

SUPREME COURT

Case No. 01-3063-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WAYLON PICOTTE,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS
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HONORABLE PETER J. NAZE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By accepting the court of appeals' certification of this case, this court has indicated that it presents issues of sufficient substance to be deserving of both oral argument and publication.

ARGUMENT

PICOTTE'S CONVICTION OF FIRST-DEGREE RECKLESS HOMICIDE SHOULD NOT BE HELD TO BE BARRED BY THE YEAR-AND-A-DAY RULE.

Introduction to Argument

Under the common law, "no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act," *Rogers v. Tennessee*, 532 U.S. 451, 453 (2001), hereinafter the "year-and-a-day rule." Under the year-and-a-day rule, "if a person injured by an assailant survived beyond a year and one day after receiving the injuries, the defendant is excused from criminal culpability for the death." *State v. Gabehart*, 836 P.2d 102, 103 (N.M. Ct. App. 1992); *accord Jones v. Dugger*, 518 So. 2d 295, 297 (Fla. Dist. Ct. App. 1987).

The overarching issue presented on this appeal, under which all four of the specific issues Picotte presents in his brief are subsumed, is whether Picotte's conviction of first-degree reckless homicide should be held to be barred by the common law year-and-a-day rule because his victim did not die within a year and a day of the infliction of the fatal injuries. To resolve that issue, this court must answer four questions. Following this paragraph, the state will set out the four questions and what the state believes is the correct answer to each of them. In the following sections of this argument, the state will address each of the four questions in turn and will support its answers to them by persuasive argument and pertinent authority. The four questions, and the state's answers to them, are:

1. Is the year-and-a-day rule presently part of the common law of the State of Wisconsin?

   The state agrees with Picotte that the year-and-a-day rule is presently a part of the common law of this state, having been preserved as such by Wis. Const. art. XIV, § 13.

2. May this court abrogate the year-and-a-day rule? Or, put more broadly, does this court have the power to abrogate a common law rule preserved by Wis. Const. art. XIV, § 13, particularly when the Wisconsin Legislature has had the opportunity to abrogate the rule but has declined to do so?

   Based on controlling precedent from this court, the state believes there is plainly no bar to judicial abrogation of the year-and-a-day rule.

3. Should this court abrogate the year-and-a-day rule? In other words, are there sufficiently compelling reasons for this court to declare an end to the year-and-a-day rule in Wisconsin?

   Based on reason and common sense, as well as the overwhelming weight of recent authority from other jurisdictions, the state believes that abrogation of the year-and-a-day rule is warranted.

4. If this court abrogates the year-and-a-day rule, may the abrogation of that rule be applied to Picotte without violating his protection from *ex post facto* laws and his right to due process?

   Based on controlling United States Supreme Court precedent, the state believes there is no constitutional bar to this court applying to Picotte a decision abrogating the year-and-a-day rule.

A. The year-and-a-day rule is presently part of the common law of the State of Wisconsin.

The state agrees with Picotte that the year-and-a-day rule is presently part of the common law of the State of Wisconsin by virtue of art. XIV, sec. 13, of the Wisconsin Constitution (Picotte's brief at 3-5). That constitutional provision states:

> **Common law continued in force.** SECTION 13. Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

Numerous decisions have recognized that the foregoing constitutional provision makes the common law of England prior to 1776 a part of the law of this state. *See, e.g., State v. Hobson*, 218 Wis. 2d 350, 359, 577 N.W.2d 825 (1998) ("Article XIV, section 13 of the Wisconsin Constitution preserves the English common law in the condition in which it existed at the time of the American Revolution until modified or abrogated."); *State v. Boehm*, 127 Wis. 2d 351, 356 n.2, 379 N.W.2d 874 (Ct. App. 1985) ("The common law received in Wisconsin by virtue of Wis. Const. art. XIV, sec. 13, is the law arising from English decisions rendered before 1776."); *Davison v. St. Paul Fire & Marine Insurance Co.*, 75 Wis. 2d 190, 201, 248 N.W.2d 433 (1977) ("The common law to which [Wis. Const. art. XIV, § 13] applies has consistently been defined as the law arising from English court decisions rendered prior to the Revolutionary War.").

The year-and-a-day rule was plainly part of the common law of England prior to 1776. *See United States v. Jackson*, 528 A.2d 1211, 1215 (D.C. 1987) ("the year and a day rule . . . was part of the English common law in 1776"); *State v. Ruesga*, 619 N.W.2d 377, 380 (Iowa

2000) ("Both parties concede that 'a year and a day' formed a recognized part of the English common law dating back to the thirteenth century."); *People v. Stevenson*, 331 N.W.2d 143, 145 (Mich. 1982) ("the year and a day rule is well established within the tradition of the common law, dating back as early as 1278"); *State v. Vance*, 403 S.E.2d 495, 498 (N.C. 1991) ("Under the common law of England [as of the date of the signing of the Declaration of Independence], a killing was not murder unless the death of the victim occurred within a year and a day of the act inflicting injury."); *State v. Young*, 390 A.2d 556, 557 (N.J. 1978) ("There is no dispute between the parties that the year and a day rule was the common law of England prior to the adoption of the New Jersey State Constitution of 1776. The abundance and unanimity of authority on the point are manifest."); *Commonwealth v. Ladd*, 166 A.2d 501, 504 (Pa. 1960) (year-and-a-day rule "was part of the common law of England in and before 1776").

Accordingly, by virtue of Wis. Const. art. XIV, § 13, the year-and-a-day rule is presently part of the law of this state unless it has previously been "altered or suspended by the legislature."

The trial court believed that the year-and-a-day rule was abrogated by the Legislature when it provided that a prosecution for first-degree reckless homicide may be commenced at any time. *See* Wis. Stat. § 939.74(2)(a). Without going into an extended discussion of the matter, the state would simply note that in his brief Picotte has convincingly demonstrated why the trial court's conclusion in that regard cannot stand, particularly in light of the legal principle that "[r]ules of common law are not to be changed by doubtful implication and to give such effect to a statute, the language must be clear and preemptory." *State v. Hurd*, 135 Wis. 2d 266, 276, 400 N.W.2d 42 (Ct. App. 1986). As Picotte points out with supporting case authority (Picotte's brief at 5-6), the year-and-a-day rule is

not a statute of limitations, prescribing temporal limits on when a criminal prosecution for murder may be commenced. Rather, it is a substantive principle of criminal law, defining when a murder has been committed (under the rule, if the victim does not die within a year and a day, no murder has been committed). *See State v. Young*, 372 A.2d 1117, 1120 (N.J. Super. Ct. App. Div. 1977) ("The rule is to be distinguished from a statute of limitations, which bars prosecution for a crime which did occur, and declares that the crime of murder did not occur unless death followed within a year and a day of the inflicting of the mortal wounds."). Accordingly, the Legislature's enactment of a statute of limitations permitting commencement of prosecution for first-degree reckless homicide at any time does not provide the "clear and preemptory" rejection of the year-and-a-day rule that is necessary to abrogate a common law rule.

Moreover, there is legislative history relating to the Wisconsin Criminal Code that indicates that the Wisconsin Legislature has not abolished the year-and-a-day rule and that it remains a part of the common law of this state. In the 1953 revision of the Wisconsin Criminal Code, which was passed by the Legislature but which never went into effect because the act passing it required that it be reenacted by the 1955 Legislature, which was never done, *see* William A. Platz, *The Criminal Code*, 1956 Wis. L. Rev. 350, 351-52, the following provision appeared:

> 339.15 YEAR AND A DAY RULE ABOLISHED. In a prosecution for homicide the state must prove beyond a reasonable doubt the causal relation between the homicidal act and death, but shall not be required to prove that death occurred within a year and a day of such act.

5 Wisconsin Legislative Council, *Judiciary Committee Report on the Criminal Code*, at 10 (1953).

That provision certainly reflects its drafters' belief that the year-and-a-day rule was part of the common law of

Wisconsin. Only if the rule were part of the common law of this state, would the provision be necessary.

The provision in question, however, was not a part of the 1955 version of the criminal code that was enacted by the 1955 Legislature. Bill Platz, one of the architects of both the 1953 and the 1955 versions of the criminal code, explained the significance of the removal of that provision from the code:

> Another section deleted by the committee [that revised the 1953 revision of the Criminal Code and produced the 1955 version of the Criminal Code that the Legislature passed] would have abolished the rule in homicide cases that death must occur within a year and a day from the felonious act of causing death. This was a policy decision by the committee and leaves the law as it has been.[57]

[57]Annots., 20 A.L.R. 1006 (1922); 93 A.L.R. 1470 (1934).

Platz, 1956 Wis. L. Rev. at 363 (footnote to first sentence omitted). "[T]he law as it has been" was the common law year-and-a-day rule. The first annotation cited in the footnote to "the law as it has been" begins with the words, "The rule that death must ensue within a year and a day from the infliction of a mortal wound, in order to constitute homicide, obtains generally throughout the United States . . . ." Annotation, *Homicide as affected by time elapsing between wound and death*, 20 A.L.R. 1006, 1006 (1922). And the second annotation simply "supplements" the first. Annotation, *Homicide as affected by time elapsing between wound and death*, 93 A.L.R. 1470, 1470 (1934).

In view of the foregoing, the state believes that the year-and-a-day rule presently exists in Wisconsin as a common law rule preserved by Wis. Const. art. XIV, § 13, and that it has not been abolished by the Legislature.

B. This court has the power to abrogate the year-and-a-day rule.

Picotte contends that this court has no power to abrogate the year-and-a-day rule. His argument in support of that contention appears to be two-fold: first, Wis. Const. art. XIV, § 13, by its express wording, only permits the Legislature to abrogate a common law rule; second, this court is barred from changing a common law rule when "the legislature has explicitly refused to adopt such a change," as he contends is the case with respect to the year-and-a-day rule. Each of those two facets of Picotte's argument will be addressed in turn.

1. Wisconsin Const. art. XIV, § 13, does not limit this court's power to abrogate a common law rule.

In *State v. Esser*, 16 Wis. 2d 567, 115 N.W.2d 505 (1962), this court was confronted with the precise question presently being considered: whether, in the face of Wis. Const. art. XIV, § 13, which preserves common law rules "until altered or suspended *by the legislature*," the judiciary has the power to alter a common law rule. *Esser* was a state's appeal, in which the state contended that the trial court had misinstructed the jury when it defined the defense of insanity in terms more broad than the common law right-wrong test. The state argued that the "right-wrong definition was part of the common law in force in the territory of Wisconsin at the time our constitution was adopted, *and the constitution prohibits the courts from changing it*." 16 Wis. 2d at 571 (emphasis supplied). As the italicized language indicates, the state in *Esser* made precisely the same argument that Picotte is making here.

This court posed the initial question it was confronting in *Esser* as follows: "Does the constitution [referring to Wis. Const. art. XIV, § 13] restrict the court's

power to develop common law?" 16 Wis. 2d at 572 (italics omitted). It answered that question as follows:

> Just as common-law principles and rules have been recognized or developed in part through the judicial process, so the further adaptation and development of them must be part of the judicial power. The court may modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable. . . .
>
> . . . .
>
> We conclude that the function of sec. 13, art. XIV, Wis. Const., was to provide for the continuity of the common law into the legal system of the state; expressly made subject to legislative change (in as drastic degree within the proper scope of legislative power as the legislature might see fit) but impliedly subject, because of the historical course of the development of the common law, to the process of continuing evolution under the judicial power.

16 Wis. 2d at 581-84 (footnotes omitted).

In *Esser*, this court could not have been more clear: Wisconsin Const. art. XIV, § 13, does not bar this court from "rejecting" the common law rules it preserves.

Picotte attacks the *Esser* holding, and the state's reliance on it, for two reasons. First, the *Esser* holding is wrong. Second, it is dictum.

Insofar as Picotte is contending that the *Esser* holding is wrong, the only basis for that contention that the state can discover in Picotte's brief is that the *Esser* holding is allegedly in conflict with "the unambiguous words of the Wisconsin Constitution ('. . . until altered or suspended by the legislature . . .')" (Picotte's brief at 9).

The *Esser* decision provides its own best defense to the charge that it erroneously concluded that this court may reject common law rules preserved by Wis. Const. art. XIV, § 13. As *Esser* states, quoting from *Bielski v. Schulze*, 16 Wis. 2d 1, 11, 114 N.W.2d 105 (1962):

> "Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of *stare decisis*, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves . . . ."

16 Wis. 2d at 584. Thus, when Wis. Const. art. XIV, § 13, preserved the "common law," it preserved law that, by its "inherent" nature, was subject to judicial modification, including "revers[al]," i.e., abrogation. Thus, recognition of the judiciary's right to abrogate common law rules preserved by Wis. Const. art. XIV, § 13, does no violence to the plain words of that constitutional provision. It simply recognizes the nature of the "common law" that was being preserved. By definition, the "common law" is law subject to continuing development, including abrogation, by the courts. That is what Wis. Const. art. XIV, § 13, preserves: law that by historical understanding is subject to continuing evolution under the judicial power. As this court stated in the passage from *Esser* quoted above,

> the function of sec. 13, art. XIV, Wis. Const., was to provide for the continuity of the common law into the legal system of the state; . . . impliedly subject, because of the historical course of the development of the common law, to the process of continuing evolution under the judicial power.

16 Wis. 2d at 584.

Esser is sound. It is fully in accord with the wording of Wis. Const. art. XIV, § 13, once one understands the nature of the "common law" that it preserves. Picotte has not shown it to be in error.

Insofar as Picotte is contending that the *Esser* holding on which the state is relying was "superfluous to the court's holding," i.e., "dictum" (Picotte's brief at 9, 10), he also fails to make his case, for at least three reasons.

First, the holding in question was plainly essential to this court's decision in *Esser*. In *Esser*, this court adopted a standard for the insanity defense in Wisconsin that was not necessarily consistent with the common law that existed prior to 1776. 16 Wis. 2d at 575-79, 599. It felt free to do so only because it first concluded that Wis. Const. art. XIV, § 13, did not bind it to the common law formulation of the defense. That conclusion was essential to its decision and, therefore, cannot be dismissed as "superfluous to the court's holding" or "dictum."

Second, the holding in question was the product of a four and one-half page discussion in the *Esser* decision. 16 Wis. 2d at 580-84. Moreover, it was plainly germane to the controversy in *Esser*. Indeed, it went to the heart of the controversy in *Esser*, which, as shown above, centered on the state's claim that Wisconsin courts were bound to apply the common law definition of insanity by virtue of Wis. Const. art. XIV, § 13. Thus, the holding in question cannot be dismissed as "dictum":

> "[W]hen an appellate court intentionally takes up, discusses and decides a question germane to a controversy, such a decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision."

State v. Doerr, 229 Wis. 2d 616, 622 n.1, 599 N.W.2d 897 (Ct. App. 1999).

Finally, in decisions after *Esser*, this court has recognized the holding in question as establishing the law in Wisconsin on the subject at hand. Numerous decisions since *Esser* have reiterated the *Esser* holding. Some have done so by quoting the paragraph from *Esser* that concludes the quotation from it that is set out on page 9 of this brief (i.e., the paragraph in the *Esser* decision beginning with the words "We conclude that the function" and ending with the words "under the judicial power"). *See, e.g.*, *Sorensen v. Jarvis*, 119 Wis. 2d 627, 633, 350 N.W.2d

108 (1984); *Dippel v. Sciano*, 37 Wis. 2d 443, 457, 155 N.W.2d 55 (1967). Others have done so by rephrasing its holding in different words. *See, e.g., Davison v. St. Paul Fire & Marine Insurance Co.*, 75 Wis. 2d at 201 ("There is now no question that this court can . . . change existing common law principles."); *Garcia v. Hargrove*, 46 Wis. 2d 724, 731, 176 N.W.2d 566 (1970) ("The fact a common-law rule was in effect when the Wisconsin Constitution was adopted does not mean this court is 'bound by the common law' and unable to change the law when it no longer meets the economic and social needs of society.").

Perhaps the post-*Esser* decision that most effectively demonstrates that this court currently views the *Esser* holding as the established law of this state and that, under that holding, this court has the power to abrogate the year-and-a-day rule, is this court's relatively recent decision in *State v. Hobson*. In *Hobson*, this court was confronted with the question "whether Wisconsin recognizes a common law right to forcibly resist an unlawful arrest." 218 Wis. 2d at 352. This court initially concluded that, as is the case presently with respect to the year-and-a-day rule, the right to forcibly resist an unlawful arrest was, at the time of the *Hobson* decision, a part of the common law of this state by virtue of Wis. Const. art. XIV, § 13. 218 Wis. 2d at 370.

This court, however, was quick to note its agreement with the state that, notwithstanding the fact that the common law privilege to forcibly resist an unlawful arrest existed as a current fixture of Wisconsin law by virtue of Wis. Const. art. XIV, § 13, nothing prevented the court from abrogating it: "We agree with the State that this court may adopt *or refuse to adopt* such a privilege." *Id.* (emphasis added).

In *Hobson*, this court then went on to consider whether "public policy [is] best served by continuing to recognize the common law privilege to use physical force to resist an unlawful arrest, or by abrogating it." 218 Wis. 2d at 371. After extensive consideration of the issue, this court abrogated it: "Accordingly, we hold that Wisconsin has recognized a privilege to forcibly resist an unlawful arrest, but based on public policy concerns, we hereby abrogate that privilege." 218 Wis. 2d at 379-80.

Hobson provides unequivocal support for the state's position in this case that the power to abrogate a common law rule preserved by Wis. Const. art. XIV, § 13, is not limited to the Legislature, but extends to the judiciary. In *Hopson*, this court not only recognized that power, it exercised it.

In light of *Esser* and the decisions following it—most notably, *Hobson*—there can be no doubt that this court has the power to abrogate the year-and-a-day rule that presently exists in Wisconsin by virtue of Wis. Const. art. XIV, § 13.[1]

---

[1]Although he relies exclusively on Wis. Const. art. XIV, § 13, to support his contention that *only* the Wisconsin Legislature has the power and authority to abrogate the common law year-and-a-day rule, Picotte may suggest in his reply brief that Wis. Stat. § 939.10 limits the judiciary's right to abrogate common law rules of criminal law. Were such suggestion to be made, it, like Picotte's argument based on Wis. Const. art. XIV, § 13, would be defeated by the *Esser* decision. In *Esser*, the state argued that, by virtue of § 939.10, "a common-law rule of criminal law in force here in 1955 when the legislature enacted the Criminal Code . . . must remain in force and unchanged until modified by the legislature." 16 Wis. 2d at 571. This court rejected that argument. 16 Wis. 2d at 584-85. In the course of doing so, it expressly repudiated the notion that § 939.10 requires "that common-law rules not in conflict with the code are to be applied without change." 16 Wis. 2d at 585.

2. The fact that the Legislature declined to abrogate the year-and-a-day rule when it revised the criminal code in 1955 does not bar this court from doing do.

Picotte suggests that, even if the *Esser* holding represents the law of this state and generally provides this court with authority to abrogate common law rules preserved by Wis. Const. art. XIV, § 13, "this court may not abrogate the year-and-a-day rule in this case, as the legislature has explicitly refused to adopt such a change" (Picotte's brief at 10). The Legislature's "explicit[] refus[al] to adopt such a change," to which Picotte refers, is based on the legislative history of the 1955 revision of the criminal code that is laid out earlier in this brief. That history shows that a provision abrogating the year-and-a-day rule was included in the tentative version of the criminal code that passed the Legislature in its 1953 session, but was removed by the committee that revised the 1953 version to produce the final version of the code that was passed by the Legislature in its 1955 session.

To support his position, Picotte cites decisions of this court dealing with the interpretation of statutory provisions enacted by the Legislature. The teaching of those decisions, as described by Picotte in his brief (Picotte's brief at 12-14), is unremarkable. It is simply this: When the Legislature has passed a law and, in the course of doing do, has expressly or implicitly rejected a particular provision, this court cannot, in the name of statutory construction or interpretation, write that provision into the statute. To do so would be a usurpation of the legislative function.

Here, however, we are not dealing with an enactment of the Legislature, but with a common law rule created by

the courts. Whatever may be the case with respect to the former, this court's decisions plainly teach that, with respect to the latter (i.e., a common law rule), the Legislature's failure to modify or abolish it, after being given the opportunity to do so, does not preclude this court from doing so.

Concededly, there was a time in the judicial history of this state when legislative failure to pass a bill abrogating a common law rule was viewed as "an expression by the legislature that no change should be made." *Schwenkhoff v. Farmers Mutual Automobile Insurance Co.*, 6 Wis. 2d 44, 47, 93 N.W.2d 867 (1959). But that changed in 1962 when this court decided *Holytz v. Milwaukee*, 17 Wis. 2d 26, 37, 115 N.W.2d 618 (1962), in which it concluded that "it is appropriate for this court to abolish [a common law] immunity [doctrine] notwithstanding the legislature's failure to adopt corrective enactments."

Holytz has been recognized as a watershed case that permits this court to abrogate a common law rule, even though the Legislature has evidenced its refusal to abrogate the rule by rejecting proposed legislation that would have done so:

> This court seriously considered the advisability of abrogating the parental-immunity rule in negligence actions when *Schwenkhoff v. Farmers Mut. Automobile Ins. Co., supra*, was before us. We then concluded that the legislature's recent action in rejecting legislation that would have abolished the immunity foreclosed this court from so doing. In so concluding we adhered to the long-established judicial policy of not overruling our past decisions where the legislature had acted in the matter. This included the situation where the legislature had defeated a bill that had proposed changes in a rule of law laid down by court decision. Subsequently, *this policy was completely overturned* in *Holytz v. Milwaukee* (1962), 17 Wis. (2d) 26, 115 N. W. (2d) 618. We there held that it was our responsibility to change a court-made rule of law when we deemed

> the change necessary in the interests of justice even though the legislature had refused to make the change.

Goller v. White, 20 Wis. 2d 402, 412, 122 N.W.2d 193 (1963) (emphasis supplied).

Relying on *Holytz*, *Goller*, and other decisions changing or abrogating common law rules, this court has stated that it "does not interpret legislative consideration coupled with inaction as indicative of preemption" (meaning, in context, "preemption" of this court's power to modify or abrogate a common law rule). *Garcia v. Hargrove*, 46 Wis. 2d at 732.

This court's more recent decision in *Sorensen v. Jarvis*, is also instructive here. In *Sorensen*, this court was confronted with the question whether to abrogate the common law rule that barred a third party injured by an intoxicated minor from recovering damages from the retail seller who sold the intoxicating beverage to the minor. In addressing that question, this court first reviewed the *Esser* decision and determined, based on it, that it was not bound to adhere to the holdings of the common law by virtue of Wis. Const. art. XIV, § 13. 119 Wis. 2d at 632-33. It then addressed an argument very similar to Picotte's and rejected it:

> The defendant has also asserted that we are not free to change the common law as it now exists, because a recent legislative attempt to do so failed. Defendant asserts that, because Assembly Bill 371, which would have declared there was liability on one who illegally sold, furnished, or gave away intoxicating liquors illegally, was allowed to die in committee, this was tantamount to a declaration of the legislative will not to change the common law. While in the past we have indicated that nonaction by the legislature could be so interpreted (*see, Schwenkhoff v. Farmers Mutual Automobile Ins. Co.*, 11 Wis. 2d 97, 104 N.W.2d 154 (1960)), we have since stated that, even where there

> has been some evidence, arguably, of the legislature's will by its failure to act, we are not foreclosed from acting.

119 Wis. 2d at 634.[2]

In sum, the foregoing decisions plainly teach that, contrary to Picotte's contention, this court retains the

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[2]In *Sorensen*, this court went on to point out an additional reason why it should not be precluded from abrogating a common law rule simply because the Legislature, when given the opportunity to do so, had failed to abrogate the rule: "nonpassage of a bill is not reliable evidence of legislative intent, for it may have failed by reason of . . . factors unrelated to what the majority of the legislature thought about the merits of a bill." 119 Wis. 2d at 634-35.

This court's observation in that regard is particularly pertinent here. As indicated above, the provision abrogating the year-and-a-day rule was never rejected by the Legislature itself. Indeed, the one time the Legislature had the opportunity to vote on the rule—in its 1953 session—it tentatively passed a code with a provision abrogating the rule. The provision abrogating the rule was removed, not by the Legislature itself, but by the committee that revised the 1953 version of the code and produced the version of it that was presented to the 1955 Legislature. Thus, the legislative history of the 1955 code provides no basis for determining "what the majority of the legislature thought about the merits" of the provision abrogating the year-and-a-day rule.

Moreover, even if the Legislature had been presented with a bill abrogating the year-and-a-day rule and had voted it down, that would still not constitute an unequivocal indication of legislative intent with respect to the merits of the rule and its continued retention. *See State ex rel. Fitas v. Milwaukee County*, 65 Wis. 2d 130, 135, 221 N.W.2d 902 (1974) ("The nonpassage of a bill may be explainable for a number of reasons unrelated to the merits of the legislation."). It could well be that some legislators refused to vote for the bill, not because they believed that the year-and-a-day rule should be retained on its merits, but because they believed that common law rules are primarily the province of the judiciary, not the Legislature. Rejection of a bill abrogating the year-and-a-day rule could simply represent legislative deference to the judiciary with respect to common law rules. Because such rules have been created by the judiciary, legislators could simply conclude that it is primarily the judiciary's, not the Legislature's, responsibility to decide when they have become so outmoded that they should be abrogated. *Cf. Holytz v. Milwaukee*, 17 Wis. 2d at 43 (Currie, J., concurring).

authority to abrogate a common law rule, notwithstanding the fact that the Legislature has had the opportunity to abrogate the rule, but has declined to do so.

C. This court should abrogate the year-and-a-day rule.

In the preceding section of this brief, the state has established, beyond cavil, that this court *may* abrogate the year-and-a-day rule. The question this court must now address is whether it *should* abrogate the rule. In this section of its brief, the state will show that there are compelling reasons for doing do.

In determining whether it should abrogate the common law year-and-a-day rule, this court should bear mind what it had to say about the common law in *State v. Esser*:

> "The capacity of common law for growth and adaptation to new conditions is one of its most-admirable features. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country. Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside . . . ."

16 Wis. 2d at 582, quoting 11 Am. Jur. *Common Law* § 2, at 155 (1937).

That describes the situation with respect to the year-and-a-day rule to a tee. As the state will show in this section of its brief, "new conditions and the progress of society" have rendered the year-and-a-day rule "unsuited to present conditions" and "unsound." Accordingly, it should be abrogated or, as *Esser* puts it, "set aside."

Three justifications have ordinarily been given for the year-and-a-day rule. The first and most often cited is that, because of the primitive state of medical knowledge in the

thirteenth century,[3] it was not possible to establish causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and the victim's death. Therefore, it was presumed that a death which occurred more than a year and one day after the assault or injury was due to natural causes rather than criminal conduct. *See United States v. Jackson*, 528 A.2d at 1216; *Jones v. Dugger*, 518 So. 2d at 297; *State v. Ruesga*, 619 N.W.2d at 380; *Commonwealth v. Lewis*, 409 N.E.2d 771, 773 (Mass. 1980); *People v. Stevenson*, 331 N.W.2d at 146; *Commonwealth v. Ladd*, 166 A.2d at 506; *State v. Rogers*, 992 S.W.2d 393, 396 (Tenn. 1999).

Second, it has often been said that the rule arose from the early function of the jury in medieval English courts. In early English courts, jurors were required to rely upon their own knowledge to reach a verdict, and they could not rely upon the testimony of witnesses having personal knowledge of the facts or upon expert opinion testimony. Thus, even if expert medical testimony had been adequate to establish causation at common law, it would not have been admissible. *See United States v. Jackson*, 528 A.2d at 1216; *State v. Ruesga*, 619 N.W.2d at 380; *Commonwealth v. Lewis*, 409 N.E.2d at 773; *People v. Stevenson*, 331 N.W.2d at 146; *State v. Rogers*, 992 S.W.2d at 397.

Finally, the rule has occasionally been characterized as an attempt to ameliorate the harshness of the common law practice of indiscriminately imposing the death penalty for all homicides—first-degree murder and manslaughter alike. *See United States v. Jackson*, 528 A.2d at 1216; *State v. Ruesga*, 619 N.W.2d at 380; *Commonwealth v. Lewis*, 409 N.E.2d at 773; *Commonwealth v.*

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[3]The "lineage [of the year-and-a-day rule] is generally traced to the thirteenth century . . . ." *State v. Rogers*, 992 S.W.2d 393, 396 (Tenn. 1999); *accord United States v. Jackson*, 528 A.2d at 1214.

Ladd, 166 A.2d at 506; *State v. Rogers*, 992 S.W.2d at 397.

None of those justifications holds water today. Plainly, the advances of modern medical science, which permit the identification of the cause of death with great certainty, have undermined the first justification for the year-and-a-day rule. *See Rogers v. Tennessee*, 532 U.S. at 463 ("advances in medical and related science have so undermined the usefulness of the [year-and-a-day] rule as to render it without question obsolete"); *United States v. Jackson*, 528 A.2d at 1216, 1220 ("Obviously, a twentieth-century factfinder, when called upon to assess the relationship between an assault and a subsequent death, is not presented with the same causation problems as was his medieval counterpart."); *Commonwealth v. Lewis*, 409 N.E.2d at 773 ("the rule appears anachronistic upon a consideration of the advances of medical and related science in solving etiological problems"); *People v. Stevenson*, 331 N.W.2d at 146 ("The advances of modern medical science, . . . by providing strong evidence of the cause of death, have undermined the wisdom of the irrebuttable presumption that the death of one who expires more than a year and a day after receiving an injury was not caused by the injury. . . . Now, when medical causation can be proven with much greater frequency and certainty, the [year-and-a-day] rule is simply too often demonstrably wrong to be upheld."); *State v. Sandridge*, 365 N.E.2d 898, 899 (Ohio Ct. Com. Pleas 1977) ("[S]ince great advances have been made in scientific crime detection and scientific medicine, the doubt that a mortal blow is the cause of death, when death ensues a year and a day after the blow, has been largely removed."); *State v. Rogers*, 992 S.W.2d at 401 ("Modern pathologists are able to determine the cause of death with much greater accuracy than was possible in earlier times."); 2 Wayne R. LaFave and Austin W. Scott, *Substantive Criminal Law* § 7.1, at 190 (1986) ("The year-

and-a-day rule made some sense in the days of its birth, when there was little medical knowledge; but it seems strange that it should exist today.").

Similarly, modern criminal practice and procedure, which gives jurors access to expert opinion testimony regarding the cause of death, undermines the second justification for the rule. *See State v. Sandridge*, 365 N.E.2d at 899 ("The jury may now rely on the testimony of expert witnesses and need not decide issues on the basis of their own individual knowledge."); *State v. Rogers*, 992 S.W.2d at 401 ("[J]urors today may rely upon expert testimony, even when the testimony relates to an ultimate issue of fact such as causation.").

Finally, since Wisconsin does not have the death penalty, the third justification for the rule can have no sway in this state.

In short, "the reasons justifying . . . recognition [of the year-and-a-day rule] no longer exist." *State v. Rogers,* 992 S.W.2d at 397; *accord State v. Vance*, 403 S.E.2d at 499 ("any rationale for the [year-and-a-day] rule is anachronistic today"). And, when the reasons for a rule no longer exist, there is no reason to continue the rule. Common sense plainly teaches that. So does case law. *See Jones v. Dugger*, 518 So. 2d at 298 ("We think the [year-and-a-day] rule is no longer viable in our jurisprudence because when the reason for any rule of law ceases the rule should be discarded."); *Commonwealth v. Ladd*, 166 A.2d at 506 ("A rule becomes dry when its supporting reason evaporates: *cessante ratione legis cessat lex*.").

In seeking this court's abrogation of the year-and-a-day rule, the state relies principally on what it has just demonstrated: the justifications for the rule's existence have disappeared—primarily because of the advances in medical knowledge—and, therefore, the rule itself should be interred. But it also believes that there is a medical

development that provides an affirmative reason for abolishing the rule: the advent of modern life-sustaining equipment and procedures. Persons dealt mortal blows do not always die instantly, and modern medical advances permit some of them to be placed on life-support systems, with the hope, sometimes slight, that time and treatment will produce recovery from what ultimately proves to have been a fatal injury.

The availability of modern life-prolonging equipment and procedures has rendered the year-and-a-day rule problematic in two respects. First, it "raises the specter of the choice between terminating life-support systems or allowing the defendant to escape a murder charge." *People v. Stevenson*, 331 N.W.2d at 146. No one should ever be put to that choice. The decision when to remove life-support apparatus is traumatic enough without introducing this factor into the equation. As one court has noted, "the ethical dilemma faced by families and physicians whenever a decision to prolong life bears on the prosecution of an assailant would be eased by abrogation of the year and a day rule." *United States v. Jackson*, 528 A.2d at 1217 n.14.

Second, apart from, but closely related to, forcing a choice between continuation of life and criminal prosecution, there is the matter of simple justice. As one court has stated, "it would be the height of *injustice* to permit an assailant to escape punishment based on a fortuitous combination of medical marvel [i.e., developments in medical science that allow life to be prolonged] and archaic rule [i.e., the year-and-a-day rule]." *State v. Ruesga*, 619 N.W.2d at 382 (emphasis in original); *accord State v. Young*, 372 A.2d at 1121 ("The acceptance . . . of available medical technology and machines which can postpone the actual time of death, due whenever it occurs, as a result of wounds inflicted upon a victim, should not insulate the assailant from trial and punishment for the

crime."); *State v. Gabehart*, 836 P.2d at 105 ("it would be incongruous if developments in medical science that allow a victim's life to be prolonged were permitted to be used to bar prosecution of an assailant").

In determining whether to abolish the year-and-a-day rule, this court should bear in mind that the rule's abrogation would "not deprive the defendant of any fundamental right" to which he is entitled. *State v. Sandridge*, 365 N.E.2d at 899. The burden would remain "upon the prosecution to prove proximate causation—that death flowed from the wrongful act of the defendant." *Id.*

As one court has observed in this regard:

> Of course, abolition of the rule would not relieve the prosecution of its duty to prove all of the elements of the crime, including proximate causation, beyond a reasonable doubt. A murder conviction which rests upon uncertain medical speculation as to the cause of death is not a case which has been proved beyond a reasonable doubt. Fears about murder convictions for death 5, 10, or even 20 years after the injury are therefore unfounded where proximate cause is proven beyond a reasonable doubt. If such proof is available, the conviction is justified.

People v. Stevenson, 331 N.W.2d at 146; *accord State v. Ruesga*, 619 N.W.2d at 382 ("Given the State's undiminished duty to prove causation beyond a reasonable doubt in every prosecution for murder, we find no basis in justice or reason to accept Ruesga's claim that some remnant of the common law [year-and-a-day] rule remains."); *Commonwealth v. Lewis*, 409 N.E.2d at 773 ("It is reckoned a sufficient safeguard for defendants that the prosecution, quite apart from the [year-and-a-day] rule, must establish the connection between act and death by proof beyond a reasonable doubt.").

In light of the foregoing, it is not surprising that the year-and-a-day rule has received a less than warm reception in modern decisions. The rule has been denounced as

"senselessly indulgent toward homicidal malefactors." *Commonwealth v. Lewis*, 409 N.E.2d at 773. Its continuation has been labeled an "absurdity." *United States v. Jackson*, 528 A.2d at 1220. Indeed, even at its inception, it "was wooden and arbitrary . . ., since it prevented a murder conviction even in those rare cases when causation could be proved." *People v. Stevenson*, 331 N.W.2d at 146. The rule is "no longer supportable in reason." *Commonwealth v. Lewis*, 409 N.E.2d at 775. It "is clearly an anachronism" and "no longer realistic." *State v. Sandridge*, 365 N.E.2d at 899.

Were this court to abolish the year-and-a-day rule, it would simply be joining numerous other courts that have done do. As the Wisconsin Court of Appeals has observed, quoting *State v. Ruesga*, 619 S.W.2d at 380: "'The great majority of states . . . have abrogated the rule, judicially or legislatively.'" *State v. McKee*, 2002 WI App 148, n.8, ___ Wis. 2d ___, 648 N.W.2d 34; *accord People v. Stevenson*, 331 N.W.2d at 147 (abolition of the year-and-a-day rule is "in accord with the growing trend of modern authority"); *State v. Vance*, 403 S.E.2d at 499 ("In [abolishing the year-and-a-day rule], we follow the clear modern trend in other jurisdictions to abrogate the rule."); *State v. Rogers*, 992 S.W.2d at 397 ("Most courts describe the rule as outmoded and obsolete since the reasons justifying its recognition no longer exist."); 1 Wayne R. LaFave and Austin W. Scott, *Substantive Criminal Law* § 3.12, at 422 (1986) ("the modern trend is to abolish the rule"). Among the decisions that have abolished the rule in the last quarter century are the following: *United States v. Jackson*, 528 A.2d at 1220; *Jones v. Dugger*, 518 So. 2d at 298; *Commonwealth v. Lewis*, 409 N.E.2d at 775; *People v. Stevenson*, 331 N.W.2d at 149; *State v. Gabehart*, 836 P.2d at 106; *State v. Vance*, 403 S.E.2d at 499; *Commonwealth v. Ladd*, 166 A.2d at 506-07; *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987); *State v. Rogers*, 992 S.W.2d at 401.

The state believes that Picotte would be hard pressed to cite a single decision in the past quarter century that has continued to recognize the rule based on an affirmative finding that the rule deserves continuing recognition on its merits. The only decisions of which the state is aware that have refused to abolish the rule—and they are a distinct minority—have not based that refusal on a conclusion that the rule deserves retention under modern conditions. Rather, they have retained the rule based on either

- deference to higher judicial authority in a jurisdiction in which a higher court had recognized the year-and-a-day rule, *see United States v. Chase*, 18 F.3d 1166, 1173 (4th Cir. 1994) ("any further consideration of [the] concerns [that have led other courts to abolish the year-and-a-day rule] by a [federal] court of appeals is precluded by existing Supreme Court precedent"); or

- deference to the legislature, *see United States v. Jackson*, 528 A.2d at 1219 ("The government has ably pointed out in its brief the accelerated demise of the rule in the past twenty-five years. Of the eight state courts which have been directly presented with the issue, *see supra* note 11, all have criticized the rule and only two, Maryland and Missouri, have declined to abolish the rule. The Maryland and Missouri courts chose to defer to the legislature . . . ." [footnote omitted]).

That brings us to the final question that needs to be addressed before closing this section of the state's brief: whether this court should defer to the Legislature on the question whether the year-and-a-day rule should be abolished. Though related to the question addressed in section B-2 of this brief, it is slightly different. In section B-2 of this brief, the state addressed Picotte's contention that this court *must* defer to the Legislature (i.e., that this

court has no authority to abrogate the year-and-a-day rule). Here, it will address the closely related, but somewhat different, question whether this court *should*, in the exercise of its discretion, forgo exercise of the authority it has to abrogate the year-and-a-day rule and commit the question of the rule's abrogation to the Legislature.

To determine the answer to that question, the state initially directs this court to its decision in *State v. Hobson*, discussed at length in section B-1 of this brief, in which this court abrogated the common law privilege to use physical force to resist an unlawful arrest. There, the defendant "urge[d] that any change in the privilege to forcibly resist an unlawful arrest be left to the legislature." 218 Wis. 2d at 371.

This court rejected that argument:

> [I]n other cases we have deemed it our responsibility to change a common law rule when we concluded that the change was necessary in the interest of justice. This was true even though the legislature had failed to make the change. . . . The legal and societal developments since that right was first enunciated provide "compelling reasons" for us to conclude that it is now appropriate for this court to abolish that right, despite apparent legislative inaction.

218 Wis. 2d at 371-72.

As was the case with respect to the privilege to forcibly resist an unlawful arrest that was at issue in *Hobson*, there plainly exist "compelling reasons" for abolishing the year-and-a-day rule. Accordingly, this court should feel no need to defer to the Legislature on the question of the rule's abolition.

Decisions from other jurisdictions have recognized that the approach taken in *Hobson* with respect to the common law privilege to forcibly resist an unlawful arrest—in *Hobson*, this court refused to defer to the Legis-

lature on the question whether the privilege should be abolished—is the appropriate one to be taken with respect to the year-and-a-day rule. Those decisions recognize that, because the rule is one of judicial origin, it is particularly the province of the judiciary to abolish it. *State v. Pine*, 524 A.2d at 1107-08 (since "the application of the year-and-a-day rule in criminal prosecutions was originally judicial and not the act of the legislature, it is entirely appropriate for this court to make the change"); *State v. Rogers*, 992 S.W.2d at 400-01 ("Since, as previously stated, the year-and-a-day rule has its roots in the common law, and has in fact never been a part of the statutory law of this State, we refuse the defendant's suggestion to defer this issue to the General Assembly's judgment. This is an issue of law over which our review is particularly appropriate.").

And the fact that the decision to abolish the rule, like the decision to abolish the privilege to forcibly resist an unlawful arrest, *see State v. Hobson*, 218 Wis. 2d at 371, involves public policy considerations, does not render judicial abrogation of it inappropriate:

> Counsel for defendant argues for deference to the Legislature's traditional policy of defining crimes by statute and further notes that the choice between the alternatives to the year and a day rule is complex and legislative in nature. As to the first objection, we simply note that murder is a common-law crime and the year and a day rule is a judge-made rule. Under such circumstances, courts are particularly well-suited to act; *cf. Placek*, *supra*. As to the second observation, we note that mere multiplicity of choice or a range of options does not make a decision "legislative".

People v. Stevenson, 331 N.W.2d at 146-47 (footnote omitted).

In sum, there are compelling reasons for abolishing the year-and-a-day rule, which should prompt this court to

do what most other courts confronted with the issue have done: abolish the year-and-a-day rule by judicial fiat.

D. Abrogation of the year-and-a-day rule may be applied to Picotte without violating his constitutional protection from *ex post facto* laws and his right to due process.

Assuming that, as the state has requested in the preceding section of this brief, this court abrogates the year-and-a-day rule, one last question needs to be answered to determine whether the year-and-a-day rule provides a basis for setting aside Picotte's conviction: May this court apply abrogation of the rule to Picotte without violating his right not be subjected to *ex post facto* laws or his right to due process? In the following subsections of this brief, the state will separately address each of those two constitutional rights.

1. Protection from *ex post facto* laws.

The question whether Picotte's constitutional protection from *ex post facto* laws would be violated by application to him of this court's abrogation of the year-and-a-day rule is easily answered. The *ex post facto* clauses of the federal and state constitutions have no application to judicial pronouncements. That is clear from the wording of those clauses, which provide that "[n]o state shall . . . *pass* any . . . ex post facto law," U.S. Const. art. I, § 10, and that "[n]o . . . ex post facto law . . . shall ever be *passed*," Wis. Const. art. I, § 12. The clauses' use of the verb "pass" plainly indicates that they are limited to legislative enactments, for that verb describes legislative, not judicial, activity.

Both the United States Supreme Court and this court have recognized that the *ex post facto* clauses of the

federal and state constitutions apply only to legislative acts:

> "The ex post facto clause is a limitation upon the powers of the legislature . . . and does not on its own force apply to the Judicial Branch of Government."

State v. Kurzawa, 180 Wis. 2d 502, 511, 509 N.W.2d 712 (1994), quoting, with approval, *Marks v. United States*, 430 U.S. 188, 191 (1977).

In his brief, Picotte expressly and unequivocally agrees with the foregoing: "[T]he *ex post facto* clause applies *only* to legislative enactments . . . ." (Picotte's brief at 15; emphasis supplied).

Given the foregoing, no further consideration of the *ex post facto* clauses of the federal and state constitutions is necessary. They simply have no application to judicial pronouncements, such as this court's abrogation of the year-and-a-day rule.

2. Right to due process.

While, as shown in the preceding subsection of this brief, the *ex post facto* clause has no application in the present context, the due process clause does. Determining whether due process would be offended by application of this court's abrogation of the year-and-a-day rule to Picotte requires a two-step process. First, this court must determine the scope of the protection from retroactive application of judicial pronouncements that the due process clause affords. Second, it must determine whether that protection was violated here. Each step of the process is addressed in turn in the following two subsections of this brief.

a. Scope of protection afforded by due process in present context.

Insofar as the scope of protection afforded by due process in the present context is concerned, Picotte, citing *State v. Kurzawa*, 180 Wis. 2d at 510-11, contends that "a defendant's due process rights prohibit the retroactive application of judicial decisions under an analysis *identical* to that under the *ex post facto* clauses of the state and federal constitutions" (Picotte's brief at 15; emphasis supplied). Picotte is wrong.

It is true that in *State v. Kurzawa* this court stated that "the principles underlying the Ex Post Facto Clause apply to judicial pronouncements as well as to legislative acts," 180 Wis. 2d at 510-11—a statement that, when viewed in artificial isolation, could reasonably be viewed as supporting Picotte's contention that the analysis under the due process clauses of the federal and state constitutions is "identical" to that under the *ex post facto* clauses of those constitutions. But, when that statement is read in context, the matter is not so clear. In the sentence immediately following that statement, this court described the "principles" to which it was referring by quoting from the United States Supreme Court's decision in *Marks v. United States*, 430 U.S. at 191-92:

> "The ex post facto clause is a limitation upon the powers of the legislature . . . and does not on its own force apply to the Judicial Branch of Government. But the principle on which the clause is based—the notion that persons have a right to have fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment."

180 Wis. 2d at 511.

From the *Marks* quotation, it appears that it is not necessarily true that all the restrictions imposed by the *ex*

post facto clause are similarly imposed by the due process clause. Rather, *Marks* teaches that there is a fundamental principle underlying and shared by both the *ex post facto* and due process clauses, namely, the "right to have fair warning of that conduct which will give rise to criminal penalties." And it is that right, not necessarily all the restrictions imposed by the *ex post facto* clause, that the due process clause enforces. *Kurzawa*, therefore, provides at best equivocal support for Picotte's contention that the analysis under the due process clause is "identical" to that under the *ex post facto* clause.

And controlling precedent from the United States Supreme Court, *Rogers v. Tennessee*, 532 U.S. 451 (2001), unequivocally demonstrates that Picotte's contention is in error, particularly in the present context (i.e., cases involving abrogation of common law rules like the year-and-a-day rule). In *Rogers*, the Court stated:

> In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. . . . Strict application of *ex post facto* principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles.

532 U.S. at 461.

Having rejected "stringent application of *ex post facto* principles" as the test for a due process violation—the test Picotte proposes—the Court in *Rogers* went on to describe the limitations imposed by due process on decisions altering, and then giving retroactive effect to, a common law doctrine of the criminal law, such as the year-and-a-day rule:

> *Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S., at 354 (internal quotation marks omitted).
>
> We believe this limitation adequately serves the common law context as well. It accords common law courts the substantial leeway they must enjoy as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent, reevaluating and refining them as may be necessary to bring the common law into conformity with logic and common sense. It also adequately respects the due process concern with fundamental fairness and protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law. Accordingly, we conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Ibid.*

532 U.S. at 461-62.

Rogers' rejection of the "stringent application of *ex post facto* principles" as the test for a due process violation and adoption of the "unexpected and indefensible" test for determining when judicial alteration of a common law rule may be given retroactive effect unquestionably binds this court insofar as the federal due process clause is concerned. *See State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993) ("United States Supreme Court's determinations on federal questions bind state courts").

It also controls this court's interpretation of the state due process clause. This court "has repeatedly stated that the due process clauses of the state and federal constitutions are essentially equivalent and are subject to identical interpretation." *State v. Hezzie R.*, 219 Wis. 2d 848, 891, 580 N.W.2d 660 (1998); *accord State ex rel. Warren v.*

Schwarz, 219 Wis. 2d 615, 628 n.7, 579 N.W.2d 698 (1998) (due process provision of state constitution is "functional equivalent" of federal provision); *Reginald D. v. State*, 193 Wis. 2d 299, 307, 533 N.W.2d 181 (1995) ("there is no substantial difference" between due process protection afforded by state constitution and that afforded by federal constitution); *State v. Cissell*, 127 Wis. 2d 205, 223, 378 N.W.2d 691 (1985) (due process clauses of state and federal constitutions "are essentially the same"). Thus, this court's conclusion, based on its analysis of *Rogers*, regarding the scope of protection afforded in the present context by the federal due process clause "governs both constitutions." *State v. Konrath*, 218 Wis. 2d 290, 297 n.9, 577 N.W.2d 601 (1998).

Accordingly, the question that this court needs to answer to resolve the due process issue presented here is whether this court's expected abolition of the year-and-a-day rule could be deemed "unexpected and indefensible" in light of the law that existed prior to Picotte's conduct. That is the test that, under *Rogers*, is applicable under the federal due process provision. And, because both the federal and state due process provisions are to be given the same construction, it is also the test required by the state constitution.

b. Under the "unexpected and indefensible" test, due process would not be violated by application of this court's abrogation of the year-and-a-day rule to Picotte.

In *Rogers*, the United States Supreme Court was confronted with precisely the same issue as that being presently considered: "the constitutionality of the retroactive application of a judicial decision abolishing the common law 'year and a day rule.'" 352 U.S. at 453. That issue was presented because the "Supreme Court of

Tennessee abolished the rule as it had existed at common law in Tennessee and applied its decision to [the] petitioner [in *Rogers*] to uphold his conviction." *Id.*

As indicated in the preceding subsection of this brief, the Court in *Rogers* concluded that the determination whether retroactive application of the abrogation of the year-and-a-day rule was consistent with due process turned on whether the abrogation of the rule was "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." 532 U.S. at 462.

In determining whether the Tennessee court's abolition of the year-and-a-day rule was "unexpected and indefensible," the Supreme Court found three things significant. First, it pointed out that "[t]he year and a day rule is widely viewed as an outdated relic of the common law," whose primary justification has been so "undermined" by "advances in medical and related science . . . as to render [the rule] without question obsolete." 532 U.S. at 462-63.

Second, the Supreme Court noted that the year-and-a-day rule had been abolished "in the vast majority of jurisdictions recently to have addressed the issue," and it rejected the petitioner's contention that the abolition of the rule in other jurisdictions was irrelevant to whether the Tennessee Supreme Court's abolition of the rule was "unexpected and indefensible by reference to the law as it then existed." 532 U.S. at 463-64.

Finally, "and perhaps most importantly," the Supreme Court noted the status of the year-and-a-day rule in Tennessee law:

> [A]t the time of petitioner's crime the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee. The rule did not exist as part of Tennessee's statutory criminal code. And while the

> Supreme Court of Tennessee concluded that the rule persisted at common law, it also pointedly observed that the rule had never once served as a ground of decision in any prosecution for murder in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta.

532 U.S. at 464.

After invoking those three factors, the Supreme Court concluded:

> There is, in short, nothing to indicate that the Tennessee court's abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. Far from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case.

532 U.S. at 466-67.

Because the rule at issue in this case is precisely the same rule that was at issue in *Rogers*, the first two factors are equally applicable here. And consideration of the third factor provides even greater justification for finding no due process violation in applying the abrogation of the rule to Picotte than was the case in *Rogers*. Unlike Tennessee, in which three state decisions had mentioned the year-and-a-day rule, in Wisconsin the year-and-a-day rule has, insofar as the state has been able to determine, only been mentioned in one decision since statehood,[4] and in that one decision the only thing the court had to say about

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[4]One territorial decision mentioned the year-and-a-day rule, but only in that portion of the decision in which the territorial supreme court was quoting from the opinion of the trial court. *See Mau-zau-mau-ne-kah v. United States*, 1 Wis. (Pin.) 124, 126 (1841).

the rule, in addition to describing it, was that "'[t]he great majority of states . . . have abrogated [it], judicially or legislatively.'" *State v. McKee*, 2002 WI App 148, n.8.

Thus, the year-and-a-day rule has an even more tenuous foothold in Wisconsin law than the rule had in Tennessee law.[5] If, as the United States Supreme Court held in *Rogers*, the Tennessee Supreme Court could retroactively apply its decision abolishing that rule without violating due process, so can this court.[6]

---

[5]Picotte appears to suggest in his brief that the year-and-a-day rule is more firmly ensconced in Wisconsin law than it was in Tennessee law because it has been afforded constitutional protection from judicial abrogation by Wis. Const. art. XIV, § 13. But, as was plainly shown in section B-1 of this brief, under Wis. Const. art. XIV, § 13, the year-and-a-day rule has no more protection from judicial abrogation than did the rule in Tennessee. Notwithstanding that provision, this court retains full power to abrogate the year-and-a-day rule—the same power that the Tennessee Supreme Court had to abrogate that rule.

[6]In making the argument it has in this section of its brief, the state is aware of the fact that in *State v. Hobson*, in which this court abolished the common law privilege to forcibly resist an unlawful arrest, this court refused to retroactively apply its ruling to Hobson. 218 Wis. 2d at 380-81. *Hobson*, however, was decided prior to the United States Supreme Court's decision in *Rogers*. Under the case law cited in subsection D-2-a of this brief—which holds that the United States Supreme Court's interpretation of the federal due process clause is controlling not only with respect to that clause but with respect to the state due process provision as well—*Rogers* provides the controlling law on the question presently being addressed. Insofar as either the analysis or result in *Hobson* is viewed as inconsistent with *Rogers*, *Rogers*, not *Hobson*, controls. *Rogers* unequivocally supports the constitutional propriety of retroactively applying to Picotte a decision in this case abrogating the year-and-a-day rule.

CONCLUSION

For the reasons stated, the state requests this court to affirm the judgment and order from which this appeal is taken.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,980 words.

David J. Becker
David J. Becker

SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

WAYLON PICOTTE,

Defendant-Appellant.

Appeal No. 01-3063-CR

Trial No. 99-CF-1096

Appeal from a Judgment and Order of the Circuit Court of Brown County, Honorable William C. Griesbach and Peter J. Naze, Circuit Judges, Presiding
Circuit Court Case Number 99-CF-1096

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ARGUMENT

Rogers does not compel this court to abrogate the year-and-a-day rule retroactively

The court in *Rogers v. Tennessee*, 532 U.S.451 (2001) held that a state court may abolish the year-and-a-day rule and apply that abolition retroactively without violating the due process of law as guaranteed by the United States Constitution. However, the decision in *Rogers* does not, as the State contends, "also control[] this court's interpretation of the state due process clause." St. brief 32. In support of this contention, the State cites a string of cases supporting the general proposition that this Court has found the parameters of state and federal due process to be substantially similar. St. brief 32-33. However, the State does not show how the state due process analysis in any of the cases it cites applies to Mr. Picotte. The State merely asserts, in a footnote, that to the extent that the holdings or results in *Rogers* and *Hobson* conflict, "*Rogers* . . . controls." St. brief 36 (footnote 6).

In *Hobson*, this court held that both the Federal and the State Constitutions prohibit retroactive application of a new rule of law which deprives the defendant of a defense:

> The Ex Post Facto clauses of both the United States and Wisconsin Constitutions prohibit the state from enacting any

> law which imposes punishment for acts not punishable at the time they were committed. See U.S. Const. Art. I, § 10; Wis. Const. Art. I, § 12 [footnote setting forth texts of these provisions omitted]. This principle of due process applies also to law arising from judicial decision. *See State v. Kurzawa*, 180 Wis.2d 502, 510-511, 509 N.W.2d 712 (1994). The ex post facto prohibition applies as well when a new rule of law deprives a defendant of a previously available defense. *See Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *State v. Thiel*, 188 Wis.2d 695, 703, 524 N.W.2d 641 (1994).

State v. Hobson, 218 Wis.2d 350, 381, 577 N.W.2d 825, 838 (1998).

As the State concedes, the year-and-a-day rule was part of Wisconsin common law on the date Mr. Picotte committed the acts giving rise to this case. St. brief 4. As the State further concedes, the rule is a substantive principle defining when a murder is committed; if the victim does not die within a year and a day, no murder has been committed. St. brief 6. Application of the rule in Mr. Picotte's case would give him an absolute defense to a homicide prosecution, as the victim died only after more than a year and a day had passed.

In light of *Rogers*, the language quoted above from *Hobson* may no longer set forth the parameters of due process under the U.S. Constitution. However, the *Rogers* decision has no effect on this language from *Hobson* insofar as it sets forth the scope of due process protection under the

Wisconsin Constitution. The Wisconsin Supreme Court is the final arbiter of questions arising under the Wisconsin Constitution. *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶25, 639 N.W.2d 537, 544. This Court may find that the Wisconsin Constitution affords greater protection that the U.S. Constitution. *State v. Hansford*, 219 Wis.2d 226, 242, 580 N.W.2d 171 (1998).

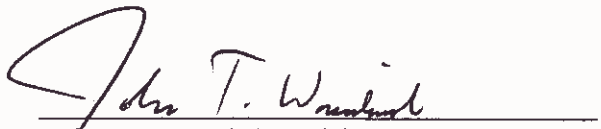
Although the State does not candidly admit it, the State is asking for this court to do more than abolish the year-and-a-day rule and apply it retroactively. The State is also asking this court to overrule *Hobson* insofar as *Hobson* holds that the Wisconsin due process clause precludes the retroactive abrogation of a defense.

In Wisconsin, unlike in *Rogers*, the ancient common law was adopted not by judicial decision, but by the State Constitution. This is how the year-and-a-day rule became part of Wisconsin common law. For this reason, Mr. Picotte had greater reason to rely on the protections of this rule than did the defendant in *Rogers*. To abrogate the year-and-a-day rule and apply it retroactively to Mr. Picotte would violate this reasonable reliance. Should this Court abrogate the rule, it should do so only prospectively, as *Hobson* instructs.

CONCLUSION

Waylon Picotte asks that the Court reverse the judgment and order of the Circuit Court of Brown County and remand with directions to dismiss the homicide information with prejudice and to credit Mr. Picotte's aggravated battery sentence with all of the time served on the homicide conviction.

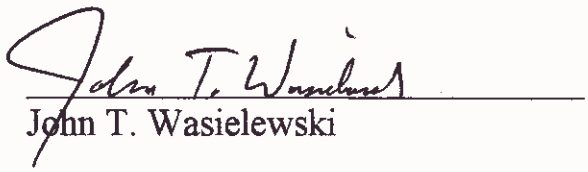
Respectfully submitted,



John T. Wasielewski
Attorney for Waylon Picotte

FORM AND LENGTH CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this reply brief is 775 words.



John T. Wasielewski

/ 01-3063

IN THE
COURT OF APPEALS OF WISCONSIN
District III
Case Number 01-3063-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

WAYLON PICOTTE,

Defendant-Appellant.

Appeal from a Judgment and Order of the Circuit Court of Brown County, Wisconsin. Honorable William C. Griesbach and Peter J. Naze, Circuit Judges, Presiding
Circuit Court Case Number 99-CF-1096

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IN THE
COURT OF APPEALS OF WISCONSIN
District III
Case Number 01-3063-CR

STATE OF WISCONSIN,

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vs.

WAYLON PICOTTE,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT
WAYLON PICOTTE

QUESTION PRESENTED FOR REVIEW

Has the Wisconsin Legislature abrogated by statute the common law "year-and-a-day" rule which created an conclusive presumption that if the victim of an attack dies more than 366 days after the attack, his death was not caused by that attack?

The Circuit Court held that when the Legislature adopted a statute of limitation for homicides, it abrogated the common law rule.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION OF OPINION

This appeal presents a straight-forward question of law that does not require oral argument.

The opinion in this case should be published. There has been no Wisconsin appellate court decision on the "year-and-a-day" rule since Territorial Days. Thus the opinion in this case will clarify or modify an existing rule of law thus warranting publication under Wis. Stat. §[RULE]809.23(1)(a)1.

STATEMENT OF THE CASE

The Defendant-Appellant, Waylon J. Picotte, was involved in a fight outside a bar in Green Bay on September 26, 1996. One of the participants in that altercation, John Jackson, was struck in the face and hit his head on a brick wall, causing brain damage which left him in a coma. As a result of these events, Picotte was charged with attacking Jackson. He pleaded guilty to aggravated battery in the Circuit Court of Brown County and was sentenced to prison.

John Jackson died on June 8, 1999. Picotte was charged with First Degree Reckless Homicide, as a party to the crime, in violation of Wis. Stat. §§940.02(1) and 939.05. Again, Jackson was the victim. Picotte was tried to a jury in the Circuit Court of Brown County, Honorable William C. Griesbach, Circuit Judge, presiding. Picotte was found guilty of this offense by the jury and was sentenced by Judge Griesbach to an indeterminate term of 30 years in prison.

Picotte filed timely post-conviction motions under Wis. Stat. §[RULE]809.30 in which he asserted that his conviction for causing Mr. Jackson's death violated the common law "year-and-a-day" rule which established an irrebutable presumption that if the death of the victim occurs more than 366 after the defendant's act, the defendant did not cause the death.

Following briefing and the submission of trial counsel's affidavit stating that he was not aware of the "year-and-a-day" rule (*Appendix* A-8-9), the Circuit Court,

Hon. Peter J. Naze, presiding, denied the motion[1]. Judge Naze decided (*Appendix* A-2-7) that when the legislature adopted a statute of limitation for homicide that action abrogated the common law "year-and-a-day" rule.

Picotte now appeals from the judgment of conviction (*Appendix* A-1) and the order denying his 809.03 motion (*Appendix* A-2-7). Picotte remains confined in the Waupun Correctional Institution serving the 30 year sentence imposed in this case. Other facts, as required will be stated in the body of this brief.

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[1] Judge Griesbach recused himself because during the pendency of the 809.30 motion he became an applicant for the position of United States District Judge for the Eastern District of Wisconsin, and the undersigned is Chairman of the Judicial Nominating Commission for that district.

ARGUMENT

DEFENDANT'S HOMICIDE CONVICTION MUST BE VACATED BECAUSE IT VIOLATES THE COMMON-LAW "YEAR-AND-A-DAY" RULE WHICH REMAINS CONTROLLING LAW IN WISCONSIN.

A. The "Year-and-a-Day" Rule Was Part of the English Common Law at the Time of the American Revolution and Wisconsin Statehood and Is Constitutionally a Part of Wisconsin Law Unless Abrogated by Statute.

Picotte is alleged to have participated in an attack upon John Jackson on September 28, 1996. Mr. Jackson died on June 8, 1999. Under the common-law, as incorporated into Wisconsin law by the State Constitution, Picotte could not be prosecuted for, or convicted of, a homicide if the victim died more than a year-and-a-day after the alleged attack. For that reason, his conviction for reckless homicide must be set aside.

"At common law...there is no homicide unless the victim dies within a year-and-a-day after the injury was inflicted. If the interval exceeds a year-and-a-day, it is conclusively presumed that the injury did not cause the death." 2 Torcia, *Wharton's Criminal Law*, §118, pp. 151-152 (15th Ed. 1994). No defendant could be convicted of

murder at common law unless the victim's death "transpired within a year-and-a-day after the stroke (from the defendant)". *Ball v. United States*, 140 U.S. 118, 133 (1891).

The year-and-a-day rule originated in the Statute of Gloucester in 1278 and was incorporated into English Common Law. *See*, Donald E. Walther, *Taming A Phoenix: The Year-and-a-Day Rule in Federal Prosecutions for Murder*, 59 U. Chi. L. Rev 1337 (1992) (providing an historical analysis of the evolution of the year-and-a-day rule). 4 W. Blackstone, Commentaries 197-198, 310- 311; 4 H. Broom, Commentaries on the Laws of England 235-236 (1869) ("no person shall be adjudged by any act whatever to have killed another, if that other does not die within a year-and-a-day after the stroke received, or cause of death administered"). Otherwise, the loss of life would be attributed to natural causes rather than the distant act inflicting injury. R.M. Perkins & R.N. Boyce, *Criminal Law* 46 (3d ed. 1982).

At the time of statehood, Wisconsin followed the

common law rule. *See, Mau-Zau-Mau-Ne-Kah v. United States*, 1 Pin. 124, 126 (Wis. 1841). When Wisconsin entered the Union in 1848, common law rights were preserved by Article XIV, Section 13 of the State Constitution.[2] The Wisconsin Supreme Court has consistently held that Article XIV, Section 13 of the Wisconsin Constitution "preserves the English common law in the condition which it existed at the time of the American Revolution until modified or abrogated." *State v. Hobson*, 218 Wis.2d 350, 359, 577 N.W. 2d 825 (1998). *See also, State v. Boehm*, 127 Wis.2d 351, 356, 379 N.W.2d 874 (Wis. Ct. App. 1985).

Because this is a rule of common law, not judge made, and because it was "received" as part of the common law existing at the time of American independence and statehood, only the legislature can modify the rule under Article XIV, Section 13 of the Wisconsin Constitution. *See, State v. Esser*, 16 Wis.2d

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[2] "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

567, 572-575, 115 N.W.2d 505 (1962). *See also, Holytz v. City of Milwaukee*, 17 Wis.2d 26, 38-39, 115 N.W.2d 618 (1962) (English law developed by judicial decision after the American Revolution can be changed by judicial decision); *Bielski v. Schultze*, 16 Wis.2d 1, 114 N.W.2d 105 (1962) (court can change common law that was not followed in Wisconsin in territorial days); *Cawker v. Dreutzer*, 197 Wis. 97, 133, 221 N.W. 401 (1960) (Wisconsin court not bound by an 1809 English decision that was not part of Wisconsin common law).

B. The Legislature Has Not Abrogated the Common Law Rule, and Hence Defendant's Conviction Must Be Set Aside.

In the 154 years since statehood, the legislature has neither abrogated nor modified the common-law year-and-a-day rule; therefore, the common law rule is still in force and applicable in Wisconsin. Defendant has a constitutional right to application of the common law rule to his case.

The Circuit Court ruled that when the Legislature adopted a limitation period for murder, it "created a

'conflict' with the common law rule. In other words, it altered the common law as to permit prosecutions such at this." (*Appendix* A-4). Picotte disagrees and asks this Court to overturn his conviction.

This is a legal issue subject to *de novo* review by this Court. *See, State v. Hobson*, 218 Wis.2d at 358, 577 N.W. 2d at 829.

1. A period of limitation is different than the "year-and-a-day" rule, and does not modify the common law rule.

Judge Naze was incorrect when he concluded that the adoption of a statute which provides no limitation for bringing murder prosecutions[3] abrogated the common law "year-and-a-day" rule. The Circuit Court confused a statute of limitation with the common law rule:

> The rule is not a statute of limitations. A statute of limitations sets the time within which the prosecution can be commenced after the crime has been completed. The year-and-a-day rule provides that the crime is not committed unless the death occurs within a year-and-a-day after the accused's act.'In other words (in a criminal prosecution) death cannot be attributed to a blow or other harm which preceded it by more than a year-and-a-day. In such a case the loss of life is attributed to natural causes rather than to the

[3] Wis. Stat. §939.74(2)(a) provides that: "A prosecution under s.940.01, 940.02, and 940.03 may be commenced at any time."

> human act which occurred so long ago.' Perkins, Criminal Law (2d ed. 1969) 28. Thus, if death ensues more than a year-and-a-day from the act of the accused, there is a conclusive presumption that the death was not caused by that act. On the other hand, if death occurs within a year-and-a-day of the act, the rule does not bar a prosecution brought any time during the life of the offender.

State v. Brown, 21 Md.App. 91, 93, 318 A.2d 257, 259 (1974).

Blackstone himself distinguished between the "year-and-a-day" rule and the period of limitations for commencing a prosecution. *See Commonwealth v. Ladd*, 402 Pa. 164, 166 A.2d 501, 503 (1960) (*citing* Book IV, ch. 14 of the Commentaries (1769), at p. 197). *See also, People v. Mudd*, 154 Ill.App.3d 808, 812, 507 N.E.2d 869, 872 (1987) ("[T]he 'year-and-a-day rule' did not operate in the nature of a statute of limitations barring prosecution. So long as the death occurred within the specified time frame, it was then presumed the blow or injury caused the death for purposes of a homicide prosecution."); *People v. Stevenson*, 416 Mich. 383, 404, 331 N.W.2d 143, 151 (1982)(Levin. J. *concurring*) ("It begs the question to say that there is no statute of limitations on prosecutions for

murder. Heretofore, it has not been murder unless the victim dies within a year-and-a-day. The year-and-a-day rule is so ancient that the statutes providing no limitations for prosecutions of murder were clearly passed with reference to that concept.")

It must also be pointed out that in territorial days, when the Supreme Court of the Wisconsin Territory specifically acknowledged the "year-and-a-day rule" in *Mau-Zau-Mau-Ne-Kah*, there was no statute of limitation for murder. *See, Statutes of the Territory of Wisconsin*, p. 374 (1839). Moreover, today in the federal system where the year-and-a-day rule continues to be followed[4], Congress has provided that there is no limitation period for bringing murder prosecutions[5]. In short, the Legislature could not have abrogated the common-law rule by the adoption of the statute regarding the limitation period, because the "year-and-a-day" rule was never a statute of limitation. It was something quite different.

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[4] *E.g. United States v. Chase*, 18 F.3d 1166 (4th Cir. 1994).

[5] *See*, 18 U.S.C. §3281.

2. *An ancient common law rule can not be implicitly abolished by a statute, particularly when the legislature has specifically provided that common law rules are preserved in criminal cases.*

There is no question but that the Wisconsin Legislature has never explicitly abolished the common "year-and-a-day" rule. Judge Naze concluded that the statute dealing with a limitation for murder was in "conflict" with the common law rule. In the preceding section of this brief, Picotte has shown one reason why the Circuit Court was incorrect in this conclusion.

But there is yet another reason why the Circuit Court erred. The common law rule could not be implicitly abolished by the statute dealing with the limitation period.

Picotte has a state constitutional right to the benefit of the common law rule. Implied repeals of common law are disfavored and should be found to exist only where the purpose of the drafters is evident. *See Gallegos v. Lyng*, 891 F.2d 788 (10th Cir.1989). Statutes which invade the common law are to be read with a presumption favoring the retention of long- established principles, except when

a statutory purpose to the contrary is evident. *See*, *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

This precise point was recently made by the Wisconsin Supreme Court:

> It is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed and leaves no doubt of the legislature's intent. Statutes in derogation of the common law are strictly construed. A statute does not change the common law unless the legislative purpose to do so is clearly expressed in the language of the statute.. To accomplish a change in the common law, the language of the statute must be clear, unambiguous, and peremptory.

Fuchsgruber v. Custom Accessories, Inc., 2001 WI 81, ¶25, 234 Wis.2d 758, 773, 628 N.W.2d 833, 841 (2001) (internal citations and punctuation omitted).

The Circuit Court cited the statute dealing with the limitation for homicide prosecutions as if it was new legislation, but the fact is that Wisconsin has *never* had a limitation period for murder. As noted above, a limitation did not exist in territorial days, and there was no limitation at the time of statehood. *See*, Wis. Stat. Chap. 146, Sec. 2 (1849). Thus it is not clear how a statute which has existed throughout the history of Wisconsin can suddenly constitute the abrogation of a common law

principle that has existed for 800 years and was acknowledge to exist in Wisconsin before statehood. Moreover, the fact that the rule has not been cited by an appellate court since before 1848 is of no consequence. The Wisconsin Supreme Court made clear that Article XIV, Section 13 of the State Constitution sustains common law rights, even if state case law has never directly adopted it. *State v. Hobson*, 218 Wis.2d at 370.

Absent an express repeal of the common law rule, retention of the same limitation period for murder that has existed for 200 years is hardly evidence of legislative intent to abolish the rule.

But there is more. Not only has the Legislature failed to repeal the "year-and-a-day" rule, it has specifically adopted a statute which says that "[t]he common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved." Wis. Stat. §939.10. As Picotte has shown throughout this brief, there is nothing in the present Wisconsin Criminal Code which conflicts with the common law rule. Absent an explicit repeal of the rules, it remains

in force. For that reason, Mr. Picotte's conviction is invalid.

CONCLUSION

For all of the foregoing reasons, Waylon Picotte asks that the judgment and order of the Circuit Court of Brown County be reversed and cause remanded with directions to dismiss the homicide information with prejudice and to credit Picotte's aggravated battery sentence with all of the time served on the homicide conviction.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT-APPELLANT

HBE
January 21, 2002

APPELLANT APPENDIX

INDEX TO APPENDIX

TE OF WISCONSIN | CIRCUIT COURT BRANCH 4 | BROWN COUNTY

State vs Waylon J Picotte

Judgment or Conviction

Sentence to Wisconsin State Prisons

Date of Birth:

Case No.: 99CF001096

The defendant was found guilty of the following crime(s):

Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1st-Degree Reckless Homicide -[939.05 Party to a Crime]	940.02(1)	Not Guilty	Felony B	09-28-1996	Jury	11-08-2000

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	01-12-2001	State Prisons	30 YR	Waupun as reception center Concurrent with present sentence Credit for time served is 4 yrs & 108 days (9/28/96 - 1/12/01)	DOC
1	01-12-2001	Forfeiture / Fine			

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
10.00	20.00				70.00		

IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155 Wisconsin Statutes.

IT IS ORDERED that the Sheriff execute this sentence.

William Griesbach, Judge
Wendy Wiggins Lemkuil , District Attorney
Ralph J Sczygelski, Defense Attorney

BY THE COURT:

Court Official

1-12-01

Date

STATE OF WISCONSIN | CIRCUIT COURT BRANCH V | BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

WAYLON J. PICOTTE,

Defendant.

AUTHENICATED COPY
FILED
OCT 31 2001
PAUL G. JANQUART
CLERK OF COURTS
BROWN COUNTY, WI

DECISION

Case No. 99 CF 1096

This case is before me on a § 809.30, Wis. Stats., post-conviction motion filed by the defendant, Waylon J. Picotte. The defendant moves to have his conviction vacated on the following grounds: (1) the prosecution violated the common law "year-and-a-day" rule; or (2) the Court erred as a matter of law by not instructing the jury on the lesser included offense of aggravated battery. In the alternative, the defendant seeks modification of his sentence from a term of 30 years to a term not to exceed 20 years.

Facts

Waylon Picotte and Dustin Teller attacked John Jackson on September 28, 1996. On October 21, 1996, Mr. Picotte was charged with substantial battery and aggravated battery. Mr. Picotte pleaded guilty to both charges and was sentenced to 10 years on the aggravated battery charge and a concurrent 5-year sentence on the substantial battery charge.

On June 8, 1999, over two-and-a-half years after the attack, John Jackson died from complications arising from the injuries he sustained during the attack. On November 22, 1999, the State charged Mr. Picotte with first degree reckless homicide – party to a crime. After a jury trial, Mr. Picotte was convicted of the charged offense and sentenced to 30 years imprisonment.

DISCUSSION

"Year-and-a-Day" Rule

At common law, the "year-and-a-day" rule provided that no defendant could be convicted of murder unless the victim had died within a year and a day of the defendant's act. *See Ball v. United States,* 140 U.S. 118, 133, 11 S.Ct. 761, 766, 35 L.Ed. 377 (1891). The rule's applicability to criminal prosecutions in this country was acknowledged by the United States Supreme Court in 1894 as follows:

> In cases of murder the rule at common law undoubtedly was that no person should be adjudged "by any act whatever to kill another who does not die by it within a year and a day thereafter...." And such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute.

Louisville, Evansville, & St. Louis R.R. Co. v. Clarke, 152 U.S. 230, 239, 14 S.Ct. 579, 581, 38 L.Ed. 422 (1894). No Wisconsin decision has directly addressed the applicability of the "year-and-a-day" rule. The only mention of the rule is by dicta in the pre-statehood case, *Mau-Zau-Mau-Ne-Kah v. The United States*, 1 Pin. 124 (1841).

Mr. Picotte argues that the "year-and-a-day" rule should apply in this case and his conviction for first degree reckless homicide should be vacated. In addition, Mr. Picotte argues that the "year-and-a-day" rule can only be abrogated or modified by the legislature and not the judiciary. To support his argument, Mr. Picotte cites Article XIV, Sec. 13 of the Wisconsin Constitution, which preserves the English common law as it existed at the time of the American Revolution until altered or suspended by the legislature.

The State contends that legislature has, in fact, abrogated the "year-and-a-day" rule by enacting § 939.10, Wis. Stats. Section 939.10, Wis. Stats. provides that "the common-law rules of criminal law not in conflict with Chapters 939 to 951 of the Wisconsin Statutes shall remain

in effect." The limitation on prosecutions for homicide created by the "year-and-a-day" rule, the State argues, directly conflicts with the time limitations found in § 939.74(2)(a), Wis. Stats. Because application of the "year-and-a-day" rule would not allow a prosecution under §§ 940.01, 940.02 or 940.03, Wis. Stats., to be commenced "at any time," the State argues that the "year-and-a-day" rule is in conflict with § 939.74(2)(a), Wis. Stats., and, thus, should not be applied in this case. Mr. Picotte's only argument relative to § 939.10, Wis. Stats., is that the "year-and-a-day" rule is not a statute of limitation.

Art. XIV Sec. 13, Wis. Const., provides that "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature." (emphasis added). The legislature has altered the common-law with respect to this issue. Section 939.10, Wis. Stats., provides that "the common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved." Section 939.74(2)(a) states that "a prosecution under §§ 940.01, 940.02, or 940.03 may be commenced at any time." The constitution clearly allows that the legislature to alter or suspend parts of the common law not inconsistent with the constitution. Thus, assuming that the "year-and-a-day" rule even existed in Wisconsin after the adoption of its constitution, the legislature, by § 939.74(2) created a "conflict" with that common law rule. In other words, it altered the common law so as to permit prosecutions such as this. Therefore, the defendant's motion to vacate his conviction by application of the "year-and-a-day" rule must be denied.

Jury Instructions on Aggravated Battery

The defendant argues that he was entitled to jury instructions on aggravated battery as a lesser included offense of first degree reckless homicide. Section 939.66, Wis. Stats., provides that a defendant may be convicted of either the crime charged or an included crime, but not both.

An "included crime" may be a crime, which does not require proof of any fact in addition to that already required to be proved for the crime charged, or an included crime may be a crime, which is a less serious type of criminal homicide than the one charged. § 939.66(1) & (2), Wis. Stats. Aggravated battery requires the intent to cause bodily harm to that person or another without the consent of the person harmed. § 940.19(1), Wis. Stats. First degree reckless homicide, on the other hand, requires recklessly causing the death of another human being under circumstances which shows utter disregard for human life. § 940.02(1), Wis. Stats.

As the defendant admits, our Court of Appeals has already addressed this issue and held that aggravated battery is not a lesser included offense of a crime which requires recklessness. *See State v. Eastman*, 185 Wis. 2d 405, 413-415, 518 N.W.2d 257 (Ct. App. 1994); *State v. Karnowski*, 170 Wis. 2d 504, 510-11, 489 N.W.2d 660 (Ct. App. 1992). I am bound by these decisions. *See* § 752.41(2), Wis. Stats. Therefore, this motion must be denied.

Reduction in Sentence

The defendant argues that the trial judge abused its discretion at sentencing by not stating on the record specific reasons for his 30-year sentence. In *Ocanas v. State,* 70 Wis. 2d 179, 233 N.W.2d 457 (1975), our Supreme Court enunciated circumstances that might be an abuse of sentencing discretion: (1) failure to state on the record the relevant and material factors which influenced the court's decision; (2) reliance upon factors which are totally irrelevant or immaterial to the type of decision to be made; and (3) too much weight given to one factor in the face of other contravening considerations. *Id.* at 187.

A review of the record reveals that there is no evidence that Judge Griesbach misused his discretion in imposing a sentence. The record shows that he articulated his reasons for imposing sentence, considered proper factors, and properly balanced competing considerations.

With respect to the gravity of the offense, the judge observed that this offense involved the loss of human life, and that "there is hardly a greater crime than the taking of a human life." (Sent. Tr., p. 19, lines 23-24, p. 20, lines 7-8). Furthermore, the jury convicted the defendant of first degree reckless homicide and the court found that:

> ...I specifically instructed them that in order for them to find you guilty of first-degree reckless homicide, they would have to find that you acted with reckless disregard for human life, and they made that finding.
>
> The offense is a very, very serious one, and in fact, you were the leader in the offense. (Sent. Tr., p. 21, lines 23-25, p. 22, lines 1-4).

As to the character of the offender, the judge noted that the defendant described himself as being the leader in the attack. (Sent. Tr., p. 21, line 1). Furthermore, Judge Griesbach stated that the defendant's life has been marked by angry outbursts, including the night of the attack on Mr. Jackson (Sent. Tr., p. 21, lines 5-11) and noted that Mr. Picotte's prior convictions included armed robbery with a read-in offense of delivery of cocaine; retail theft and disorderly conduct; as well as fighting in school which caused him to be discharged. (Sent. Tr., p. 22, lines 7-12). In addition, the Court recognized Mr. Picotte's need for rehabilitation. (Sent. Tr., p. 23, lines 18-20).

In his brief, the defendant argues that:

> It is not clear what basis the court has for sentencing Mr. Picotte to a 25 percent longer sentence than Mr. Teller. The record fails to disclose such reason. The only obvious difference between this defendant and the co-defendant is that this man went to trial while the other man did not. (Defendant's brief p. 5)

The defendant's assertion is simply not accurate. In his sentencing remarks, Judge Griesbach said:

> Certainly, the danger that consumed you exploded that evening, and Mr. Teller joined in. He was a follower and he followed you and he also manifested the kind of rage that even you seemed to manifest earlier.

> I can't justify a lesser sentence than Mr. Teller received on the grounds that your involvement was less, because I do not believe that it was. (Sent. Tr., p. 21, lines 12-19).

The judge also discussed in some detail the defendant's substantial prior record vis à vis Mr. Teller's single prior adjudication. (Sent. Tr., p. 22, lines 4-12). Thus, Judge Griesbach properly exercised his sentencing discretion by clearly articulating his reasons for sentencing Mr. Picotte to a different term than that Mr. Teller received.

As to protection of the public, the judge stated that Mr. Picotte is not out "roaming the streets, hurting other people, looking for fights..." (Sent. Tr., p. 22, lines 20-22). The judge found that the defendant's prior record shows a need to protect the public, (Sent. Tr., p. 23, lines 6-8), and noted that Mr. Picotte's imprisonment had saved other people's lives. (Sent. Tr., p. 22, line 25).

Judge Griesbach articulated his reasons for imposing a sentence, considered proper sentencing factors, and exercised proper judicial discretion. For these reasons, the defendant's motion for sentence reduction, too, must be denied.

For the reasons set forth above, each of the defendant's post-conviction motions dated June 9, 2001, is **DENIED.**

DATED: October 31, 2001.

BY THE COURT:

Peter J. Naze, Circuit Court Judge

cc: John P. Zakowski, D.A.
Attorney Howard B. Eisenberg

STATE OF WISCONSIN CIRCUIT COURT Branch 4 BROWN COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 99-CF-001096

WAYLON J. PICOTTE,

Defendant.

AFFIDAVIT

Ralph J. Sczygelski, being first duly sworn on oath, respectfully deposes and states as follows:

1. I am an attorney licensed to practice law in the State of Wisconsin.
2. I was appointed by the State Public Defender to represent the Defendant in this case.
3. I am aware that Defendant's post-conviction counsel, Howard Eisenberg, has raised the issue of whether Defendant's prosecution and conviction for homicide in this case violated the common law "year and a day" rule.
4. I did not raise this issue at trial because I was not aware of the common law rule until brought to my attention by Mr. Eisenberg.
5. Had I been aware of the common law "year and a day" rule at the time of the trial in this case, I certainly would have raised the issue as a complete bar to the prosecution of the Defendant
6. I had no strategic reason for not raising this issue. The only reason I had for not

raising the issue is that I was not aware of the law on this point.

RALPH J. SCZYGELSKI

Sworn and subscribed to before me this 28th day of September, 2001.

Jennifer Blake-Krueger
NOTARY PUBLIC, STATE OF WISCONSIN

My Commission: expires 7/20/2003

CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced by a proportional serif font. The length of this Brief is 2,512 words.

Dated: 1/21/02

Respectfully submitted,

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ATTORNEY FOR APPELLANT

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COURT OF APPEALS

DISTRICT III

Case No. 01-3063-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WAYLON PICOTTE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT AND ORDER OF THE CIRCUIT COURT FOR BROWN COUNTY, HONORABLE WILLIAM C. GREISBACH AND HONORABLE PETER J. NAZE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

COURT OF APPEALS

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ON APPEAL FROM A JUDGMENT AND ORDER OF THE CIRCUIT COURT FOR BROWN COUNTY, HONORABLE WILLIAM C. GREISBACH AND HONORABLE PETER J. NAZE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

QUESTION PRESENTED FOR REVIEW

Because of the manner in which the trial court decided this case, the defendant-appellant (hereinafter "Picotte") has phrased the question presented on this appeal very narrowly:

> Has the Wisconsin Legislature abrogated by statute the common law "year-and-a-day" rule which created an [sic] conclusive presumption that if the victim of an attack dies more than 366 days after the attack, his death was not caused by that attack?

(Picotte's brief at 1.) Picotte phrased the question presented in that fashion to focus on the ground upon

which the trial court rejected the applicability of the common law year-and-a-day rule here. The trial court ruled that it had been abrogated by the Wisconsin Legislature.

Were the answer to the narrow question Picotte sets out dispositive of this appeal, the state's brief and this court's decision could be very short. As will be seen in the argument portion of this brief, the state does not dispute Picotte's contention that the Wisconsin Legislature has not abrogated the year-and-a-day rule. That, however, does not dispose of this appeal. The question presented is much broader than it has been phrased by Picotte. The question presented is this:

In the present case, in which the victim died more than a year and a day after Picotte and another attacked him and inflicted the injuries that caused his death, should Picotte's conviction of first-degree reckless homicide be set aside because the common law year-and-a-day rule bars his conviction of that offense?

As will be seen in the argument portion of this brief, resolution of that issue requires this court to answer a number of questions in addition to the one posed by Picotte. Those questions are set out in the introduction to the argument section of this brief and are addressed in depth in the various subsections of that section of this brief.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral Argument. The plaintiff-respondent (hereinafter "the state") does not deem oral argument necessary because it believes that the relief Picotte seeks is plainly not warranted under the legal authority that is cited in the argument portion of this brief.

Publication. Publication is warranted because this case will answer a number of novel questions, not previously addressed in Wisconsin case law, regarding the year-and-a-day rule.

ARGUMENT

PICOTTE'S CONVICTION OF FIRST-DEGREE RECKLESS HOMICIDE SHOULD NOT BE HELD TO BE BARRED BY THE YEAR-AND-A-DAY RULE.

Introduction to Argument

Under the common law, "no defendant could be convicted of murder unless his victim had died by the defendant's act within a year and a day of the act," *Rogers v. Tennessee*, 532 U.S. 451, 453 (2001), hereinafter the "year-and-a-day rule." Under the rule, "if a person injured by an assailant survived beyond a year and one day after receiving the injuries, the defendant is excused from criminal culpability for the death." *State v. Gabehart*, 836 P.2d 102, 103 (N.M. Ct. App. 1992); *accord Jones v. Dugger*, 518 So. 2d 295, 297 (Fla. Dist. Ct. App. 1987).

As indicated above, the issue presented on this appeal is whether Picotte's conviction of first-degree reckless homicide is barred by the common law year-and-a-day rule because his victim did not die within a year and a day of the infliction of the fatal injuries. To resolve that issue, the state believes that this court must answer four questions. Following this paragraph, the state will set out the four questions and what the state believes is the correct answer to each of them. In the following sections of this argument, the state will address each of the four questions in turn and will support its answers to them by citation of controlling (in the case of Wisconsin decisions) or convincing (in the case of decisions from other jurisdictions)

precedent. The four questions, and the state's answers to them, are:

1. Is the year-and-a-day rule presently part of the common law of the State of Wisconsin?

   The state agrees with Picotte that the year-and-a-day rule is presently a part of the common law of this state, having been preserved as such by Wis. Const. art. XIV, § 13.

2. May this court abrogate the year-and-a-day rule? Or, put more broadly, does this court have the power to abrogate common law rules preserved by Wis. Const. art. XIV, § 13, or is that power reserved exclusively to the Wisconsin Legislature?

   Based on controlling Wisconsin Supreme Court precedent, the state believes there is plainly no bar to judicial abrogation of the year-and-a-day rule. Picotte is wrong when he contends that abrogation of the rule falls within the *exclusive* province of the Wisconsin Legislature.

3. Should this court abrogate the year-and-a-day rule? In other words, are there sufficient reasons for this court to declare an end to the year-and-a-day rule in Wisconsin?

   Based on reason and common sense, as well as the overwhelming weight of recent authority from other jurisdictions addressing the issue, the state believes that abrogation of the year-and-a-day rule is warranted.

4. If this court abrogates the year-and-a-day rule, may the abrogation of that rule be applied to Picotte without violating his constitutional rights,

in particular, his right to due process and his protection from *ex post facto* laws?

Based on controlling precedent from the United States Supreme Court, the state believes there is no constitutional bar to this court applying to Picotte a decision in this case abrogating the common law year-and-a-day rule.

A. The year-and-a-day rule is presently part of the common law of the State of Wisconsin.

The state agrees with Picotte that the year-and-a-day rule is presently part of the common law of the State of Wisconsin. It does not, however, arrive at that conclusion by precisely the same route as Picotte does.

Picotte appears to suggest two reasons why the year-and-a-day rule is part of the common law of this state. The state agrees with the second, but rejects the first.

At pages 6-7 and 11 of his brief, Picotte suggests, although he does not explicitly state, that the year-and-a-day rule is part of the common law of the state because it was recognized by the Supreme Court of the Territory of Wisconsin in *Mau-zau-mau-ne-kah v. United States*, 1 Pin. 124 (Wis. 1841). However, the portion of the decision in that case that makes reference to the year-and-a-day rule is the portion in which the supreme court is quoting from the opinion of the trial court (which quotation begins at page 126 of the decision and runs almost half the way down on page 128 of the decision). Nowhere in the supreme court's analysis of the issues presented, which begins at the middle of page 128 of the decision, is there any reference to the year-and-a-day rule. Insofar as Picotte is suggesting that in *Mau-zau-mau-ne-kah v.*

United States, the territorial supreme court recognized or adopted the year-and-a-day rule, he is wrong.

Picotte is correct, however, in asserting that the year-and-a-day rule does exist as part of the common law of this state, albeit for the second reason he posits: it exists as part of the common law of this state by virtue of art. XIV, sec. 13, of the Wisconsin Constitution (Picotte's brief at 7). That constitutional provision states:

> **Common law continued in force.** SECTION 13. Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature.

Numerous decisions have recognized that the foregoing constitutional provision makes a part of the law of this state the common law of England prior to 1776. *See, e.g., State v. Hobson*, 218 Wis. 2d 350, 359, 577 N.W.2d 825 (1998) ("Article XIV, section 13 of the Wisconsin Constitution preserves the English common law in the condition in which it existed at the time of the American Revolution until modified or abrogated."); *State v. Boehm*, 127 Wis. 2d 351, 356 n.2, 379 N.W.2d 874 (Ct. App. 1985) ("The common law received in Wisconsin by virtue of Wis. Const. art. XIV, sec. 13, is the law arising from English decisions rendered before 1776."); *Davison v. St. Paul Fire & Marine Insurance Co.*, 75 Wis. 2d 190, 201, 248 N.W.2d 433 (1977) ("The common law to which [Wis. Const. art. XIV, § 13] applies has consistently been defined as the law arising from English court decisions rendered prior to the Revolutionary War.").

The year-and-a-day rule was plainly part of the common law of England prior to 1776. *See United States v. Jackson*, 528 A.2d 1211, 1215 (D.C. 1987) ("the year and a day rule . . . was part of the English common law in 1776"); *State v. Ruesga*, 619 N.W.2d 377, 380 (Iowa 2000) ("Both parties concede that 'a year and a day'

formed a recognized part of the English common law dating back to the thirteenth century."); *People v. Stevenson*, 331 N.W.2d 143, 145 (Mich. 1982) ("the year and a day rule is well established within the tradition of the common law, dating back as early as 1278"); *State v. Vance*, 403 S.E.2d 495, 498 (N.C. 1991) ("Under the common law of England [as of the date of the signing of the Declaration of Independence], a killing was not murder unless the death of the victim occurred within a year and a day of the act inflicting injury."); *State v. Young*, 390 A.2d 556, 557 (N.J. 1978) ("There is no dispute between the parties that the year and a day rule was the common law of England prior to the adoption of the New Jersey State Constitution of 1776. The abundance and unanimity of authority on the point are manifest."); *Commonwealth v. Ladd*, 166 A.2d 501, 504 (Pa. 1960) (year-and-a-day rule "was part of the common law of England in and before 1776").

Accordingly, by virtue of Wis. Const. art. XIV, § 13, the year-and-a-day rule is presently part of the law of this state unless it has previously been "altered or suspended by the legislature."

The trial court believed that the year-and-a-day rule was abrogated by the Legislature when it provided that a prosecution for first-degree reckless homicide may be commenced at any time. *See* Wis. Stat. § 939.74(2)(a). Without going into an extended discussion of the matter, the state would simply note that in his brief Picotte has rather convincingly demonstrated why the trial court's conclusion in that regard cannot stand, particularly in light of the legal principle that "[r]ules of common law are not to be changed by doubtful implication and to give such effect to a statute, the language must be clear and preemptory." *State v. Hurd*, 135 Wis. 2d 266, 276, 400 N.W.2d 42 (Ct. App. 1986). As Picotte points out with supporting case authority (Picotte's brief at 10-11), the year-and-a-day rule is not a statute of limitations, prescrib-

ing temporal limits on when a criminal prosecution for murder may be commenced. Rather, it is a substantive principle of criminal law, defining when a murder has been committed (under the rule, if the victim does not die within a year and a day, no murder has been committed). *See State v. Young*, 372 A.2d 1117, 1120 (N.J. Super. Ct. App. Div. 1977) ("The rule is to be distinguished from a statute of limitations, which bars prosecution for a crime which did occur, and declares that the crime of murder did not occur unless death followed within a year and a day of the inflicting of the mortal wounds."). Accordingly, the Legislature's enactment of a statute of limitations permitting commencement of prosecution for the offense at issue at any time does not provide the "clear and preemptory" rejection of the year-and-a-day rule that is necessary to abrogate a common law rule.

Moreover, there is legislative history relating to the Wisconsin Criminal Code that indicates that the Wisconsin Legislature has not abolished the year-and-a-day rule and that it remains a part of the common law of this state. In the 1953 revision of the Wisconsin Criminal Code, which was passed by the Legislature but which never went into effect because the act passing it required that it be reenacted by the 1955 Legislature, which was never done, *see* William A. Platz, *The Criminal Code*, 1956 Wis. L. Rev. 350, 351-52, the following provision appeared:

> 339.15 YEAR AND A DAY RULE ABOLISHED. In a prosecution for homicide the state must prove beyond a reasonable doubt the causal relation between the homicidal act and death, but shall not be required to prove that death occurred within a year and a day of such act.

5 Wisconsin Legislative Council, *Judiciary Committee Report on the Criminal Code*, at 10 (1953).

That provision certainly reflects its drafters' belief that the year-and-a-day rule was part of the common law of

Wisconsin. Only if the rule were part of the common law of this state, would the provision be necessary.

The provision in question, however, was not a part of the 1955 version of the Criminal Code that was enacted by the 1955 Legislature. Bill Platz, one of the architects of both the 1953 and the 1955 versions of the Criminal Code, explained the significance of the removal of that provision from the code:

> Another section deleted by the committee [that revised the 1953 revision of the Criminal Code and produced the 1955 version of the Criminal Code that the Legislature passed] would have abolished the rule in homicide cases that death must occur within a year and a day from the felonious act of causing death. This was a policy decision by the committee and leaves the law as it has been.[57]

---

[57]Annots., 20 A.L.R. 1006 (1922); 93 A.L.R. 1470 (1934).

Platz, 1956 Wis. L. Rev. at 363 (footnote to first sentence omitted). "[T]he law as it has been" was, apparently, the common law year-and-a-day rule. The first annotation cited in the footnote to "the law as it has been" begins with the words, "The rule that death must ensue within a year and a day from the infliction of a mortal wound, in order to constitute homicide, obtains generally throughout the United States . . . ." Annotation, *Homicide as affected by time elapsing between wound and death*, 20 A.L.R. 1006, 1006 (1922). And the second annotation simply "supplements" the first. Annotation, *Homicide as affected by time elapsing between wound and death*, 93 A.L.R. 1470, 1470 (1934).

In view of the foregoing, the state believes that the year-and-a-day rule presently exists in Wisconsin as a common law rule preserved by Wis. Const. art. XIV, § 13, and that it has not been abolished by the Legislature.

B. This court has the power to abrogate the year-and-a-day rule.

Picotte argues that the foregoing is dispositive of this case and, therefore, this court's analysis of the issue presented can stop here. Because the year-and-a-day rule is part of the common law of this state and has not been abolished by the Legislature, it must, according to Picotte, be accepted by this court as a controlling legal principle that is beyond this court's power to modify and, under it, his conviction cannot stand.

The state, on the other hand, believes that the foregoing simply triggers, rather than terminates, the critical analysis in which this court must engage to resolve the question whether the year-and-a-day rule bars Picotte's conviction. It requires this court to proceed to consideration of whether this court may abrogate the year-and-a-day rule, whether it should abrogate the rule, and whether abrogation of the rule may constitutionally be applied to Picotte to remove the bar to his conviction that the rule would otherwise constitute.

As indicated, Picotte believes that this court has no power to abrogate the year-and-a-day rule. He asserts that, under Wis. Const. art. XIV, § 13, "*only* the legislature can modify the rule" (Picotte's brief at 7; emphasis supplied). He could not be more wrong.

As the primary support for his contention that this court has no power to modify the year-and-a-day rule, Picotte cites *State v. Esser*, 16 Wis. 2d 567, 115 N.W.2d 505 (1962). Actually, *Esser* teaches exactly the opposite of what Picotte contends it stands for.

In *Esser*, the Wisconsin Supreme Court was directly confronted with the precise question presently being considered: whether, in the face of Wis. Const. art. XIV, § 13, which preserves common law rules "until altered or

suspended *by the legislature*," the judiciary has the power to alter a common law rule. *Esser* was a state's appeal, in which the state contended that the trial court had misinstructed the jury when it defined the defense of insanity in terms more broad than the common law right-wrong test. The state argued that the "right-wrong definition was part of the common law in force in the territory of Wisconsin at the time our constitution was adopted, *and the constitution prohibits the courts from changing it*." 16 Wis. 2d at 571 (emphasis supplied). As the italicized language indicates, the state in *Esser* made precisely the same argument that Picotte is making here.

The supreme court posed the initial question it was confronting in *Esser* as follows: "Does the constitution [referring to Wis. Const. art. XIV, § 13] restrict the court's power to develop common law?" 16 Wis. 2d at 572 (italics omitted). It then restated the state's position on the matter: "The state contends that the right-wrong rule was part of the common law of England before the American Revolution, was therefore in force in the territory of Wisconsin when our constitution was adopted, *and therefore cannot be altered or suspended by the courts*." *Id.* (emphasis supplied).

In its analysis of the issue presented, the court found itself confronted with the "fundamental question whether sec. 13, art. XIV, Wis. Const., prohibited judicial development of rules or principles as part of the common law in the light of advances in knowledge and newly emerging conditions of society." 16 Wis. 2d at 580. The court answered that question as follows:

> Just as common-law principles and rules have been recognized or developed in part through the judicial process, so the further adaptation and development of them must be part of the judicial power. The court may modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable. . . .

. . . .

> Although a number of decisions of this court have relied upon sec. 13, art. XIV, Wis. Const., as a reason for applying a particular doctrine of the common law and have thus exemplified the doctrine that established common-law rules will be followed unless after thorough consideration the court is convinced that new circumstances and needs of our society require a change, these decisions do not commit this court to retention of every common-law rule developed before 1776 or 1848.
>
> . . . .
>
> We conclude that the function of sec. 13, art. XIV, Wis. Const., was to provide for the continuity of the common law into the legal system of the state; expressly made subject to legislative change (in as drastic degree within the proper scope of legislative power as the legislature might see fit) but impliedly subject, because of the historical course of the development of the common law, to the process of continuing evolution under the judicial power.

16 Wis. 2d at 581-84 (footnotes omitted).

The court in *Esser* could not have been more clear: Wisconsin Const. art. XIV, § 13, does not bar courts from rejecting, in light of new circumstances and needs, the common law rules it preserves.

Numerous decisions since *Esser* have reiterated its holding in that regard. Some have done so by quoting the paragraph from *Esser* that concludes the quotation from it that is set out two paragraphs back (i.e., the paragraph in the *Esser* decision beginning with the words "We conclude that the function" and ending with the words "under the judicial power"). *See, e.g., Sorensen v. Jarvis*, 119 Wis. 2d 627, 633, 350 N.W.2d 108 (1984); *Dippel v. Sciano*, 37 Wis. 2d 443, 457, 155 N.W.2d 55 (1967). Others have done so by rephrasing its holding in different words. *See, e.g., Davison v. St. Paul Fire & Marine Insurance Co.*, 75 Wis. 2d at 201 ("There is now no question that this court can . . . change existing common law principles."); *Garcia v. Hargrove*, 46 Wis. 2d 724, 731,

176 N.W.2d 566 (1970) ("The fact a common-law rule was in effect when the Wisconsin Constitution was adopted does not mean this court is 'bound by the common law' and unable to change the law when it no longer meets the economic and social needs of society").

Perhaps the post-*Esser* decision that most effectively supports the state's contention that the judiciary has the power to abrogate the year-and-a-day rule is *State v. Hobson*. In *Hobson*, the supreme court was confronted with the question "whether Wisconsin recognizes a common law right to forcibly resist an unlawful arrest." 218 Wis. 2d at 352. The court initially concluded that, as is the case presently with respect to the year-and-a-day rule, the right to forcibly resist an unlawful arrest was, at the time of the *Hobson* decision, a part of the common law of this state:

> [T]he common law privilege [to forcibly resist an unlawful arrest] has existed in Wisconsin, by virtue of article XIV, § 13 of the Wisconsin Constitution, until today.
>
> Nothing in our statutes or case law demonstrates that this common law privilege has been, until now, modified or abrogated.

218 Wis. 2d at 370.

The court, however, was quick to note its agreement with the state that, notwithstanding the fact that the common law privilege to forcibly resist an unlawful arrest existed as a current fixture of Wisconsin law by virtue of Wis. Const. art. XIV, § 13, nothing prevented the court from abrogating it. Immediately following the sentences from the decision just quoted, the court, citing *Esser*, added: "We agree with the State that this court may adopt *or refuse to adopt* such a privilege." *Id.* (emphasis added).

The *Hobson* court then went on to consider whether "public policy [is] best served by continuing to recognize

the common law privilege to use physical force to resist an unlawful arrest, or by abrogating it." 218 Wis. 2d at 371. After extensive consideration of the issue, the court abrogated it:

> In sum, the majority of jurisdictions has concluded that violent self-help is antisocial and unacceptably dangerous. We agree that there should be no right to forcibly resist an unlawful arrest in the absence of unreasonable force. When persons resist arrest, they endanger themselves, the arresting officers, and bystanders. Although we are sympathetic to the temporary deprivation of liberty the individual may suffer, the law permits only a civilized form of recourse. . . . Accordingly, we hold that Wisconsin has recognized a privilege to forcibly resist an unlawful arrest, but based on public policy concerns, we hereby abrogate that privilege.

218 Wis. 2d at 379-80.

Hobson provides unequivocal support for the state's position in this case that the power to abrogate a common law rule preserved by Wis. Const. art. XIV, § 13, is not limited to the Legislature, but extends to the judiciary. In *Hopson*, the court not only recognized that power, it exercised it.

In light of *Esser* and the decisions following it—most particularly, *Hobson*—there can be no doubt that this court has the power to abrogate the year-and-a-day rule that presently exists in Wisconsin by virtue of Wis. Const. art. XIV, § 13.[1]

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[1] Although he relies primarily, if not exclusively, on Wis. Const. art. XIV, § 13, to support his contention that *only* the Wisconsin Legislature has the power and authority to abrogate the common law year-and-a-day rule, Picotte also makes passing reference in the last paragraph of his brief to Wis. Stat. § 939.10, which provides, in relevant part, that "[t]he common-law rules of criminal law not in conflict with chs. 939 to 951 are preserved." In his reply brief, Picotte may suggest that § 939.10 limits the judiciary's right to abrogate common law rules of criminal law. Were such suggestion

C. This court should abrogate the year-and-a-day rule.

In the preceding section of this brief, the state has established, beyond cavil, that this court *may* abrogate the

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to be made, it, like Picotte's argument based on Wis. Const. art. XIV, § 13, would be defeated by the *Esser* decision. In *Esser*, the state argued that, by virtue of § 939.10, "a common-law rule of criminal law in force here in 1955 when the legislature enacted the Criminal Code . . . must remain in force and unchanged until modified by the legislature." 16 Wis. 2d at 571. The supreme court rejected that argument. 16 Wis. 2d at 584-85. In the course of doing so, it expressly repudiated the notion that § 939.10 requires "that common-law rules not in conflict with the code are to be applied without change." 16 Wis. 2d at 585.

There is another argument that the state anticipates Picotte may make in his reply brief: only the Wisconsin Supreme Court, and not this court, has the power to abrogate a common law rule preserved by Wis. Const. art. XIV, § 13. Were such argument to be made, it would be plainly wrong. In the first place, *Esser*, which recognizes that power, expressly refers to it as a "judicial power," 16 Wis. 2d at 581, 584, which strongly suggests that it is a broader power than one whose exercise is simply limited to the supreme court. Moreover, the supreme court has expressly recognized that, while this court's function is primarily error correction, in the course of exercising that function in the cases before it, it necessarily engages in law development, including "adapt[ation of] the common law," which, the state believes, would include abrogation of common law rules that have outlived their usefulness:

> The court of appeals, a unitary court, as two functions. Its primary function is error correcting. Nevertheless under some circumstances it necessarily performs a second function, that of law defining and law development, as it adapts the common law and interprets the statutes and federal and state constitutions in the cases it decides.

Cook v. Cook, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997); *accord Sweeney v. General Casualty Co.*, 220 Wis. 2d 183, 196, 582 N.W.2d 735 (Ct. App. 1998). Finally, in other jurisdictions that, like Wisconsin, have a two-tiered appellate system, intermediate courts of appeal have not hesitated to abrogate the year-and-a-day rule. *See Jones v. Dugger*, 518 So. 2d 295, 298 (Fla. Dist. Ct. App. 1987); *State v. Young*, 372 A.2d 1117, 1121 (N.J. Super. Ct. App. Div. 1977); *State v. Gabehart*, 836 P.2d 102, 106 (N.M. Ct. App. 1992).

year-and-a-day rule. The question this court must now address is whether it *should* abrogate the rule. In this section of its brief, the state will show that there are compelling reasons for doing do.

In determining whether it should abrogate the common law year-and-a-day rule, this court should bear mind what the Wisconsin Supreme Court had to say about the common law in *State v. Esser*:

> "The capacity of common law for growth and adaptation to new conditions is one of its most-admirable features. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country. Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside . . . ."

16 Wis. 2d at 582, quoting 11 Am. Jur. *Common Law* § 2, at 155 (1937).

That describes the year-and-a-day rule to a tee. As will be shown in the balance of this section of the state's brief, "new conditions and the progress of society" have rendered the year-and-a-day rule "unsuited to present conditions" and "unsound." Accordingly, it should be abolished or, as *Esser* puts it, "set aside."

Three justifications have ordinarily been given for the year-and-a-day rule. The first and most often cited justification is that, because of the primitive state of medical knowledge in the thirteenth century,[2] it was not possible to

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[2]The "lineage [of the year-and-a-day rule] is generally traced to the thirteenth century where the rule was originally utilized as a statute of limitations governing the time in which an individual might initiate a private action for murder known as 'appeal of death.'" *State v. Rogers*, 992 S.W.2d 393, 396 (Tenn. 1999); *accord United States v. Jackson*, 528 A.2d 1211, 1214 (D.C. 1987) (the "origins [of the year-and-a-day rule] have been traced to the thirteenth century").

establish causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and the victim's death. Therefore, it was presumed that a death which occurred more than a year and one day after the assault or injury was due to natural causes rather than criminal conduct. *See United States v. Jackson*, 528 A.2d at 1216; *Jones v. Dugger*, 518 So. 2d at 297; *State v. Ruesga*, 619 N.W.2d at 380; *Commonwealth v. Lewis*, 409 N.E.2d 771, 773 (Mass. 1980); *People v. Stevenson*, 331 N.W.2d at 146; *Commonwealth v. Ladd*, 166 A.2d at 506; *State v. Rogers*, 992 S.W.2d 393, 396 (Tenn. 1999).

Second, it has often been said that the rule arose from the early function of the jury in medieval English courts. In early English courts, jurors were required to rely upon their own knowledge to reach a verdict, and they could not rely upon the testimony of witnesses having personal knowledge of the facts or upon expert opinion testimony. Thus, even if expert medical testimony had been adequate to establish causation at common law, it would not have been admissible. *See United States v. Jackson*, 528 A.2d at 1216; *State v. Ruesga*, 619 N.W.2d at 380; *Commonwealth v. Lewis*, 409 N.E.2d at 773; *People v. Stevenson*, 331 N.W.2d at 146; *State v. Rogers*, 992 S.W.2d at 397.

Finally, the rule has occasionally been characterized as an attempt to ameliorate the harshness of the common law practice of indiscriminately imposing the death penalty for all homicides—first-degree murder and manslaughter alike. *See United States v. Jackson*, 528 A.2d at 1216; *State v. Ruesga*, 619 N.W.2d at 380; *Commonwealth v. Lewis*, 409 N.E.2d at 773; *Commonwealth v. Ladd*, 166 A.2d at 506; *State v. Rogers*, 992 S.W.2d at 397.

None of those justifications holds water today. Plainly, the advances of modern medical science, which permit the identification of the cause of death with great certainty, have undermined the first justification for the

year-and-a-day rule. *See Rogers v. Tennessee*, 532 U.S. at 463 ("advances in medical and related science have so undermined the usefulness of the [year-and-a-day] rule as to render it without question obsolete"); *United States v. Jackson*, 528 A.2d at 1216, 1220 ("Obviously, a twentieth-century factfinder, when called upon to assess the relationship between an assault and a subsequent death, is not presented with the same causation problems as was his medieval counterpart."); *Commonwealth v. Lewis*, 409 N.E.2d at 773 ("the rule appears anachronistic upon a consideration of the advances of medical and related science in solving etiological problems"); *People v. Stevenson*, 331 N.W.2d at 146 ("The advances of modern medical science, . . . by providing strong evidence of the cause of death, have undermined the wisdom of the irrebuttable presumption that the death of one who expires more than a year and a day after receiving an injury was not caused by the injury. . . . Now, when medical causation can be proven with much greater frequency and certainty, the [year-and-a-day] rule is simply too often demonstrably wrong to be upheld."); *State v. Sandridge*, 365 N.E.2d 898, 899 (Ohio Ct. Com. Pleas 1977) ("[S]ince great advances have been made in scientific crime detection and scientific medicine, the doubt that a mortal blow is the cause of death, when death ensures a year and a day after the blow, has been largely removed."); *State v. Rogers*, 992 S.W.2d at 401 ("Modern pathologists are able to determine the cause of death with much greater accuracy than was possible in earlier times."); 2 Wayne R. LaFave and Austin W. Scott, *Substantive Criminal Law* § 7.1, at 190 (1986) ("The year-and-a-day rule made some sense in the days of its birth, when there was little medical knowledge; but it seems strange that it should exist today.").

Similarly, modern criminal practice and procedure, which gives jurors access to expert opinion testimony regarding the cause of death, undermines the second

justification for the rule. *See State v. Sandridge*, 365 N.E.2d at 899 ("The jury may now rely on the testimony of expert witnesses and need not decide issues on the basis of their own individual knowledge."); *State v. Rogers*, 992 S.W.2d at 401 ("[J]urors today may rely upon expert testimony, even when the testimony relates to an ultimate issue of fact such as causation. [Citations omitted.] Indeed, adoption of the rules of evidence has made the admission of expert testimony routine.").

Finally, since Wisconsin does not have the death penalty, the third justification for the rule can have no sway in this state.

In short, "the reasons justifying . . . recognition [of the year-and-a-day rule] no longer exist." *State v. Rogers,* 992 S.W.2d at 397; *accord State v. Vance*, 403 S.E.2d at 499 ("any rationale for the [year-and-a-day] rule is anachronistic today"). And, when the reasons for a rule no longer exist, there is no reason to continue the rule. Common sense, the polestar of the common law, *see State v. Esser*, 16 Wis. 2d at 582, quoting with approval from 11 Am. Jur. *Common Law* § 2, at 154 ("'the common law is the legal embodiment of practical sense'"), plainly teaches that. So does case law. *See Jones v. Dugger*, 518 So. 2d at 298 ("We think that the [year-and-a-day] rule is no longer viable in our jurisprudence because when the reason for any rule of law ceases the rule should be discarded."); *Commonwealth v. Ladd*, 166 A.2d at 506 ("A rule becomes dry when its supporting reason evaporates: *cessante ratione legis cessat lex.*").

In seeking this court's abrogation of the year-and-a-day rule, the state relies principally on what it has just demonstrated: the justifications for the rule's existence have disappeared—primarily because of the advances in medical knowledge—and, therefore, the rule itself should be interred. But it also believes that there is a medical

development that provides an affirmative reason for abolishing the rule: the advent of modern life-sustaining equipment and procedures. Persons dealt mortal blows do not always die instantly, and modern medical advances permit some of them to be placed on life-support systems, with the hope, sometimes slight, that time and treatment will produce recovery from what ultimately proves to have been a fatal injury.

The availability of modern life-prolonging equipment and procedures has rendered the year-and-a-day rule problematic in two respects. First, it "raises the specter of the choice between terminating life-support systems or allowing the defendant to escape a murder charge." *People v. Stevenson*, 331 N.W.2d at 146. No one should ever be put to that choice. The decision when to remove life-support apparatus is traumatic enough without introducing this factor into the equation. As one court has noted, "the ethical dilemma faced by families and physicians whenever a decision to prolong life bears on the prosecution of an assailant would be eased by abrogation of the year and a day rule." *United States v. Jackson*, 528 A.2d at 1217 n.14.

Second, apart from, but closely related to, forcing a choice between continuation of life and criminal prosecution, there is the matter of simple justice. As one court has stated, "it would be the height of *injustice* to permit an assailant to escape punishment based on a fortuitous combination of medical marvel [i.e., developments in medical science that allow life to be prolonged] and archaic rule [i.e., the year-and-a-day rule]." *State v. Ruesga*, 619 N.W.2d at 382 (emphasis in original); *accord State v. Young*, 372 A.2d at 1121 ("The acceptance . . . of available medical technology and machines which can postpone the actual time of death, due whenever it occurs, as a result of wounds inflicted upon a victim, should not insulate the assailant from trial and punishment for the

crime."); *State v. Gabehart*, 836 P.2d at 105 ("it would be incongruous if developments in medical science that allow a victim's life to be prolonged were permitted to be used to bar prosecution of an assailant").

In determining whether to abolish the year-and-a-day rule, this court should bear in mind that its abrogation would "not deprive the defendant of any fundamental right" to which he is entitled. *State v. Sandridge*, 365 N.E.2d at 899. The burden would remain "upon the prosecution to prove proximate causation—that death flowed from the wrongful act of the defendant." *Id.*

As one court has observed in this regard:

> Of course, abolition of the rule would not relieve the prosecution of its duty to prove all of the elements of the crime, including proximate causation, beyond a reasonable doubt. A murder conviction which rests upon uncertain medical speculation as to the cause of death is not a case which has been proved beyond a reasonable doubt. Fears about murder convictions for death 5, 10, or even 20 years after the injury are therefore unfounded where proximate cause is proven beyond a reasonable doubt. If such proof is available, the conviction is justified.

People v. Stevenson, 331 N.W.2d at 146; *accord State v. Ruesga*, 619 N.W.2d at 382 ("Given the State's undiminished duty to prove causation beyond a reasonable doubt in every prosecution for murder, we find no basis in justice or reason to accept Ruesga's claim that some remnant of the common law [year-and-a-day] rule remains."); *Commonwealth v. Lewis*, 409 N.E.2d at 773 ("It is reckoned a sufficient safeguard for defendants that the prosecution, quite apart from the [year-and-a-day] rule, must establish the connection between act and death by proof beyond a reasonable doubt.").

In light of the foregoing, it is not surprising that the year-and-a-day rule has received a less than warm reception in modern decisions. The rule has been denounced as

"senselessly indulgent toward homicidal malefactors." *Commonwealth v. Lewis*, 409 N.E.2d at 773. Its continuation has been labeled an "absurdity." *United States v. Jackson*, 528 A.2d at 1220. Indeed, even at its inception, it "was wooden and arbitrary . . ., since it prevented a murder conviction even in those rare cases when causation could be proved." *People v. Stevenson*, 331 N.W.2d at 146. The rule is "no longer supportable in reason." *Commonwealth v. Lewis*, 409 N.E.2d at 775. It "is clearly an anachronism" and "no longer realistic." *State v. Sandridge*, 365 N.E.2d at 899.

Were this court to abolish the year-and-a-day rule, it would simply be joining numerous other courts that have done do. *See State v. Ruesga*, 619 S.W.2d at 380 ("The great majority of states, however, have abrogated the rule, judicially or legislatively."); *People v. Stevenson*, 331 N.W.2d at 147 (abolition of the year-and-a-day rule is "in accord with the growing trend of modern authority"); *State v. Vance*, 403 S.E.2d at 499 ("In [abolishing the year-and-a-day rule], we follow the clear modern trend in other jurisdictions to abrogate the rule."); *State v. Rogers*, 992 S.W.2d at 397 ("Most courts describe the rule as outmoded and obsolete since the reasons justifying its recognition no longer exist."); 1 Wayne R. LaFave and Austin W. Scott, *Substantive Criminal Law* § 3.12, at 422 (1986) ("the modern trend is to abolish the rule"). Among the decisions that have abolished the rule in the last quarter century are the following: *United States v. Jackson*, 528 A.2d at 1220; *Jones v. Dugger*, 518 So. 2d at 298; *Commonwealth v. Lewis*, 409 N.E.2d at 775; *People v. Stevenson*, 331 N.W.2d at 149; *State v. Young*, 390 A.2d at 559; *State v. Gabehart*, 836 P.2d at 106; *State v. Vance*, 403 S.E.2d at 499; *Commonwealth v. Ladd*, 166 A.2d at 506-07; *State v. Pine*, 524 A.2d 1104, 1107 (R.I. 1987); *State v. Rogers*, 992 S.W.2d at 401.

The state believes that Picotte would be hard pressed to cite a single decision in the past quarter century that has continued to recognize the rule based on an affirmative finding that the rule deserves continuing recognition on its merits. The only decisions of which the state is aware that have refused to abolish the rule—and they are a distinct minority—have not based that refusal on a conclusion that the rule deserves retention under modern conditions. Rather, they have retained the rule based on either

- deference to higher judicial authority in a jurisdiction in which, unlike the situation in Wisconsin, a higher court had recognized the year-and-a-day rule, *see United States v. Chase*, 18 F.3d 1166, 1173 (4th Cir. 1994) ("any further consideration of [the] concerns [that have led other courts to abolish the year-and-a-day rule] by a [federal] court of appeals is precluded by existing Supreme Court precedent"); or

- deference to the legislature, *see United States v. Jackson*, 528 A.2d at 1219 ("The government has ably pointed out in its brief the accelerated demise of the rule in the past twenty-five years. Of the eight state courts which have been directly presented with the issue, *see supra* note 11, all have criticized the rule and only two, Maryland and Missouri, have declined to abolish the rule. The Maryland and Missouri courts chose to defer to the legislature . . . ." [footnote omitted]).

That brings us to the final matter that needs attention before closing this section of the state's brief. It is anticipated that Picotte may argue in his reply brief that even if, as the state has shown in the preceding section of this brief, this court has the power to abrogate the year-and-a-day rule, and even if, as the state has shown in this section of its brief, there are compelling reasons for abrogating

the rule, this court should nonetheless defer to the Legislature on the matter.

Were that argument to be made, the state's response to it would be to direct this court to the Wisconsin Supreme Court's decision in *State v. Hobson*, discussed at length in section B of this brief, in which the supreme court abrogated the common law privilege to use physical force to resist an unlawful arrest. The same argument was made there: "Ms. Hobson urges that any change in the privilege to forcibly resist an unlawful arrest be left to the legislature." 218 Wis. 2d at 371.

The supreme court rejected that argument:

> [I]n other cases we have deemed it our responsibility to change a common law rule when we concluded that the change was necessary in the interest of justice. This was true even though the legislature had failed to make the change. *See, e.g., Holytz v. Milwaukee*, 17 Wis. 2d 26, 29, 115 N.W.2d 618 (1962) (abrogating the principle of governmental immunity from tort claims); *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983) (adopting discovery rule for all tort actions other than those already governed by a legislatively created discovery rule). As with the governmental immunity doctrine addressed in *Holytz*, we are satisfied that the privilege to forcibly resist an unlawful arrest has judicial origins. *See Holytz*, 17 Wis. [2d] at 37. The legal and societal developments since that right was first enunciated provide "compelling reasons" for us to conclude that it is now appropriate for this court to abolish that right, despite apparent legislative inaction. *See State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 296, 219 N.W.2d 308 (1974) (instructing that where common law rules govern intentional conduct, changes should only be made for compelling reasons).

218 Wis. 2d at 371-72.

Like the common law privilege to forcibly resist an unlawful arrest, the common law year-and-a-day rule has "judicial origins." And, as was the case with respect to the privilege to forcibly resist an unlawful arrest, there plainly

exist "compelling reasons" for abolishing the year-and-a-day rule, as the state has demonstrated in this section of its brief. Accordingly, this court should feel no need to defer to the Legislature on the question of the rule's abolition.

Decisions from other jurisdictions have recognized that the approach taken in *Hobson* with respect to the common law privilege to forcibly resist an unlawful arrest—the *Hobson* court refused to defer to the Legislature on the question whether the privilege should be abolished—is the appropriate one to be taken with respect to the year-and-a-day rule. Those decisions recognize that, because the rule is one of judicial origin, it is particularly the province of the judiciary to abolish it. *State v. Pine*, 524 A.2d at 1107-08 (since "the application of the year-and-a-day rule in criminal prosecutions was originally judicial and not the act of the legislature, it is entirely appropriate for this court to make the change"); *State v. Rogers*, 992 S.W.2d at 400-01 ("Since, as previously stated, the year-and-a-day rule has its roots in the common law, and has in fact never been a part of the statutory law of this State, we refuse the defendant's suggestion to defer this issue to the General Assembly's judgment. This is an issue of law over which our review is particularly appropriate.").

And the fact that the decision to abolish the rule, like the decision to abolish the privilege to forcibly resist an unlawful arrest, involves public policy considerations, does not render judicial abrogation of it inappropriate:

> Recognizing that the year and a day rule is archaic and should be abandoned, we must decide whether this Court should take such action or whether deference to the Legislature is appropriate.
>
> Counsel for defendant argues for deference to the Legislature's traditional policy of defining crimes by statute and further notes that the choice between the alternatives to the year and a day rule is complex and legislative in nature. As to the first objection, we simply note that murder is a

> common-law crime and the year and a day rule is a judge-made rule. Under such circumstances, courts are particularly well-suited to act; *cf. Placek*, *supra*. As to the second observation, we note that mere multiplicity of choice or a range of options does not make a decision "legislative". Further, since the Legislature remains free to change the common law, the ultimate decision as to whether to retain the rule or some form of it resides in the Legislature.
>
> We hold, in the exercise of our constitutional authority to shape and advance the common law, that the year and a day rule has outlived its usefulness and is therefore abolished.

People v. Stevenson, 331 N.W.2d at 146-47.

In sum, there are compelling reasons for abolishing the year-and-a-day rule, which should prompt this court to do what most other courts confronted with the issue have done: abolish the year-and-a-day rule by judicial fiat.

D. If this court abrogates the year-and-a-day rule, as the state believes it will for the reasons suggested in the preceding section of this brief, that abrogation of the rule may be applied to Picotte without violating his constitutional rights—in particular, his right to due process and his protection from *ex post facto* laws.

Assuming that, as the state has requested in the preceding section of this brief, this court abrogates the year-and-a-day rule, one last question would need to be answered to determine whether the year-and-a-day rule provides a basis for setting aside Picotte's conviction: May this court apply that abrogation of the rule to Picotte without violating his constitutional rights—in particular, his right to due process and his protection from *ex post facto* laws? That question is unequivocally answered in the affirmative by the United States Supreme Court's recent decision in *Rogers v. Tennessee*, 532 U.S. 451 (2001).

In *Rogers*, the Supreme Court was confronted with precisely the same issue that this court will be presented with if it abrogates the year-and-a-day rule in its decision in this case: "the constitutionality of the retroactive application of a judicial decision abolishing the common law 'year and a day rule.'" 352 U.S. at 453. That issue was presented because the "Supreme Court of Tennessee abolished the rule as it had existed at common law in Tennessee and applied its decision to [the] petitioner [in *Rogers*] to uphold his conviction." *Id.*

In its decision in *Rogers*, the Supreme Court described the decision of the Tennessee Supreme Court that was under review in that case as follows:

> The [Tennessee Supreme C]ourt observed that it had recognized the viability of the year and a day rule in Tennessee in *Percer v. State*, 118 Tenn. 765, 103 S. W. 780 (1907), and that, "[d]espite the paucity of case law" on the rule in Tennessee, "both parties . . . agree that the . . . rule was a part of the common law of this State." 992 S. W. 2d, at 396. Turning to the rule's present status, the court noted that the rule has been legislatively or judicially abolished by the "vast majority" of jurisdictions recently to have considered the issue. *Id.*, at 397. The court concluded that, contrary to the conclusion of the Court of Criminal Appeals, the 1989 Act had not abolished the rule. After reviewing the justifications for the rule at common law, however, the court found that the original reasons for recognizing the rule no longer exist. Accordingly, the court abolished the rule as it had existed at common law in Tennessee. *Id.*, at 399-401.
>
> The court disagreed with petitioner's contention that application of its decision abolishing the rule to his case would violate the *Ex Post Facto* Clauses of the State and Federal Constitutions. Those constitutional provisions, the court observed, refer only to legislative Acts. The court then noted that in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court held that due process prohibits retroactive application of any "'judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue.'" 992 S. W. 2d, at 402 (quoting *Bouie v. City of*

> *Columbia*, *supra*, at 354) (alteration in original). The court concluded, however, that application of its decision to petitioner would not offend this principle. 992 S.W.2d, at 402.

532 U.S. at 455-56.

Thus, if this court renders a decision in this case that tracks the argument made in the preceding sections of this brief—i.e., if this court finds, as both the state and Picotte agree, that the common law year-and-a-day rule presently exists in Wisconsin, but agrees with the state that the rule should be abolished—and then proceeds to apply its decision to abolish the rule to Picotte to uphold his conviction, this case will present precisely the same situation as that presented in *Rogers*.

In *Rogers*, the Supreme Court first addressed whether the Tennessee Supreme Court's decision to retroactively apply its decision to the petitioner violated the *ex post facto* clause of the federal constitution. It concluded that it did not because the *ex post facto* clause has no application to judicial decisions—in particular, to decisions, such as the one involved in *Rogers* and the one anticipated by the state in this case, abolishing the year-and-a-day rule:

> The *Ex Post Facto* Clause, by its own terms, does not apply to courts. Extending the Clause to courts through the rubric of due process thus would circumvent the clear constitutional text. It also would evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other.
>
> . . . .
>
> That is particularly so where, as here, the allegedly impermissible judicial application of a rule of law involves not the interpretation of a statute but an act of common law judging. In the context of common law doctrines (such as the year and a day rule), there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States

> in which the criminal law retains some of its common law elements. Strict application of *ex post facto* principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles.

532 U.S. at 460-61.

However, while the *ex post facto* clause has no application in this context, the due process clause does. In *Rogers*, the Supreme Court described the limitations imposed by due process on decisions altering, and then giving retroactive effect to, a common law doctrine of the criminal law, such as the year-and-a-day rule:

> *Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S., at 354 (internal quotation marks omitted).
>
> We believe this limitation adequately serves the common law context as well. It accords common law courts the substantial leeway they must enjoy as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent, reevaluating and refining them as may be necessary to bring the common law into conformity with logic and common sense. It also adequately respects the due process concern with fundamental fairness and protects against vindictive or arbitrary judicial lawmaking by safeguarding defendants against unjustified and unpredictable breaks with prior law. Accordingly, we conclude that a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Ibid.*

532 U.S. at 461-62.

Thus, the question that had to be answered in *Rogers*, and that will need to be answered here if this court

abolishes the year-and-a-day rule, is whether abolition of the year-and-a-day rule was, or in this case would be, "unexpected and indefensible" in light of the law that existed prior to the defendant's conduct. In answering that question and concluding that "the Tennessee court's abolition of the year and day rule was not unexpected and indefensible," 532 U.S. at 462, the Supreme Court found three things significant. First, it pointed out that

> [t]he year and a day rule is widely viewed as an outdated relic of the common law. Petitioner does not even so much as hint that good reasons exist for retaining the rule, and so we need not delve too deeply into the rule and its history here. Suffice it to say that the rule is generally believed to date back to the 13th century, when it served as a statute of limitations governing the time in which an individual might initiate a private action for murder known as an "appeal of death"; that by the 18th century the rule had been extended to the law governing public prosecutions for murder; that the primary and most frequently cited justification for the rule is that 13th century medical science was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and his death; and that, as practically every court recently to have considered the rule has noted, advances in medical and related science have so undermined the usefulness of the rule as to render it without question obsolete.

532 U.S. at 462-63.

Second, the Supreme Court noted that the year-and-a-day rule had been abolished "in the vast majority of jurisdictions recently to have addressed the issue," and it rejected the petitioner's contention that the abolition of the rule in other jurisdictions was irrelevant to whether the Tennessee Supreme Court's abolition of the rule was "unexpected and indefensible by reference to the law as it then existed":

> [T]he year and a day rule has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue. See 992 S. W. 2d, at 397, n. 4 (reviewing cases and statutes). Citing *Bouie*,

> petitioner contends that the judicial abolition of the rule in other jurisdictions is irrelevant to whether he had fair warning that the rule in Tennessee might similarly be abolished and, hence, to whether the Tennessee court's decision was unexpected and indefensible as applied to him. Brief for Petitioner 28-30. In discussing the apparent meaning of the South Carolina statue in *Bouie*, we noted that "[i]t would be a rare situation in which the meaning of a statute of another State sufficed to afford a person 'fair warning' that his own State's statute meant something quite different from what its words said." 378 U.S., at 359-360. This case, however, involves not the precise meaning of the words of a particular statute, but rather the continuing viability of a common law rule. Common law courts frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience. Due process, of course, does not require a person to apprise himself of the common law of all 50 States in order to guarantee that his actions will not subject him to punishment in light of a developing trend in the law that has not yet made its way to his State. At the same time, however, the fact that a vast number of jurisdictions have abolished a rule that has so clearly outlived its purpose is surely relevant to whether the abolition of the rule in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed.

532 U.S. at 463-64.

Finally, "and perhaps most importantly," the Supreme Court noted the status of the year-and-a-day rule in Tennessee law:

> [A]t the time of petitioner's crime the year and a day rule had only the most tenuous foothold as part of the criminal law of the State of Tennessee. The rule did not exist as part of Tennessee's statutory criminal code. And while the Supreme Court of Tennessee concluded that the rule persisted at common law, it also pointedly observed that the rule had never once served as a ground of decision in any prosecution for murder in the State. Indeed, in all the reported Tennessee cases, the rule has been mentioned only three times, and each time in dicta.
>
> . . . .

> . . . [The year and a day rule] was a principle in name only, having never once been enforced in the State.

532 U.S. at 464-66.

After invoking those three factors—first, the year-and-a-day rule is an obsolete relic of a bygone day; second, the rule has been abolished in the vast majority of jurisdictions to recently consider it; third, the rule had never been invoked as a ground for decision in Tennessee law—the Supreme Court concluded:

> There is, in short, nothing to indicate that the Tennessee court's abolition of the rule in petitioner's case represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect. Far from a marked and unpredictable departure from prior precedent, the court's decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense. It did so by laying to rest an archaic and outdated rule that had never been relied upon as a ground of decision in any reported Tennessee case.

532 U.S. at 466-67.

Because the rule at issue in this case is precisely the same rule that was at issue in *Rogers*, the first two factors are equally applicable here. And consideration of the third factor provides even greater justification for finding no due process violation in abrogating the rule and applying the abrogation of the rule to Picotte than was the case in *Rogers*. Unlike Tennessee, in which state decisions had at least mentioned the year-and-a-day rule, in Wisconsin the year-and-a-day rule has, since statehood, never even been referred to in Wisconsin case law. At least the state is unaware of any decision since statehood that has mentioned the rule, and Picotte cites none.

Only one Wisconsin decision has ever mentioned the year-and-a-day rule, but that decision dates back to territorial days. *See Mau-zau-mau-ne-kah v. United States*, 1

Pin. at 126. And, as indicated earlier in this brief, the portion of the decision in that case that makes reference to the year-and-a-day rule is the portion in which the territorial supreme court was quoting from the opinion of the trial court. Nowhere in the supreme court's own analysis of the issues presented is there any reference to the year-and-a-day rule.

Thus, the year-and-a-day rule has an even more tenuous foothold in Wisconsin law than the rule had in Tennessee law. If, as the United States Supreme Court held in *Rogers*, the Tennessee Supreme Court could constitutionally apply to the defendant before it its decision abolishing that rule, this court can certainly do the same in this case without violating Picotte's constitutional rights.[3]

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[3]In making the argument it has in this section of its brief, the state is aware of the fact that in *State v. Hobson*, in which the Wisconsin Supreme Court abolished the common law privilege to forcibly resist an unlawful arrest, that court refused to retroactively apply the rule to Hobson. 218 Wis. 2d at 380-81. The state, however, does not believe that *Hobson* can legitimately be read as foreclosing retroactive application to Picotte of a decision abrogating the year-and-a-day rule in this case.

In assessing whether the supreme court's refusal in *Hobson* to retroactively apply its holding in that case to Hobson forecloses retroactive application to Picotte of a decision in this case abrogating the year-and-a-day rule, it needs to be noted that the *Hobson* decision's discussion of the retroactivity issue is very brief. Indeed, the decision's entire discussion of the legal principles underlying its retroactivity holding consists of a single paragraph comprised of three sentences (¶41 of the decision). 218 Wis. 2d at 381.

Given the brevity of the retroactivity discussion in *Hobson*, it is difficult to extract from it much guidance in resolving the retroactivity issue that would be presented in this case were this court to apply to Picotte a decision abrogating the year-and-a-day rule. But such legal principles as can be extracted from that brief discussion support the state's contention that the United States Supreme Court's decision in *Rogers* provides the legal guidelines that control disposition of the retroactivity issue in this case.

Like *Rogers*, the *Hobson* decision recognizes that the *ex post facto* clauses of the state and federal constitutions are limited to

In sum, in light of the United States Supreme Court's decision in *Rogers v. Tennessee*, there is no basis for finding any constitutional bar to applying to Picotte a decision in this case abolishing the year-and-a-day rule.

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legislative enactments. 218 Wis. 2d at 381. It is due process that controls the question of the constitutional propriety of the retroactive application of judicial decisions. *Id.*

With respect to the question whether due process would be offended by retroactive application to Picotte of a decision in this case abrogating the year-and-a-day rule, *Hobson* teaches, albeit indirectly, that it is to United States Supreme Court decisions that one must look to provide the guiding principles. The only due process decision that *Hobson* cites is "*State v. Kurzawa*, 180 Wis. 2d 502, 510-11, 509 N.W.2d 712 (1994)." 218 Wis. 2d at 381. And when one examines the cited pages from the *Kurzawa* decision, one discovers that it was to the United States Supreme Court's decisions, and to those decisions alone, that the Wisconsin Supreme Court looked to discern the controlling due process principles. In doing so, the supreme court was acting consistently with the general approach it takes in determining the scope of the protection afforded by due process: "the [federal and state constitutions] provide identical procedural due process protections." *County of Kenosha v. C & S Management, Inc.*, 223 Wis. 2d 373, 393, 588 N.W.2d 236 (1999). Thus, the due process question presented in this case turns on the interpretation of federal constitutional law, with respect to which *Rogers*, which was decided after *Hobson*, is controlling. *See State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993) ("United States Supreme Court's determinations on federal questions bind state courts").

Under controlling United States Supreme Court precedent, i.e., *Rogers*, the critical question that needs to be answered to determine whether there would be a due process violation if a decision in this case abrogating the year-and-a-day rule were to be applied to Picotte is: Is abrogation of the year-and-a-day rule "unexpected and indefensible" in light of the law that existed prior to Picotte's conduct? On that question, the *Hobson* decision provides no guidance, one way or the other. The court in *Hobson* did not address that question even with respect to the abrogation of the common law rule at issue in *Hobson*, and it certainly had no occasion to, and did not, address that question with respect to the abrogation of the common law rule at issue here. *Rogers*, however, definitively answers that question. And it definitively answers that question in favor of the constitutional propriety of retroactively applying to Picotte a decision in this case abrogating the year-and-a-day rule.

The constitutional protection against *ex post facto* laws has no application here because it is a judicial decision, not a legislative enactment, that the state is attempting to apply retroactively to Picotte. And due process presents no bar to retroactive application to Picotte of a decision abolishing the year-and-a-day rule because that decision cannot be deemed "unexpected and indefensible" in light of the law that existed prior to Picotte's conduct.

CONCLUSION

For the reasons stated, the state requests this court to affirm the judgment and order from which this appeal is taken.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,723 words.

David J. Becker

David J. Becker

IN THE
COURT OF APPEALS OF WISCONSIN
District III
Case Number 01-3063-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

WAYLON PICOTTE,

Defendant-Appellant.

Appeal from a Judgment and Order of the Circuit Court of Brown County, Wisconsin. Honorable William C. Griesbach and Peter J. Naze, Circuit Judges, Presiding
Circuit Court Case Number 99-CF-1096

REPLY BRIEF FOR DEFENDANT-APPELLANT WAYLON PICOTTE

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IN THE
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STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

WAYLON PICOTTE,

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT WAYLON PICOTTE

ARGUMENT

I. EVEN IF THIS COURT CONCLUDES THAT IT SHOULD ABROGATE THE COMMON LAW "YEAR AND A DAY" RULE, IT STILL MUST GRANT RELIEF TO THIS DEFENDANT.

A. Application of a Change in the Common-Law to this Defendant Would Violate the Wisconsin Constitution.

The State admits that at the time of the act in this case, and at the time of trial, the common-law year-and-a-day rule, prohibited Picotte's prosecution and conviction for homicide. The State further admits that the Circuit

Court's legal reasoning was erroneous and that the Wisconsin legislature has never, in fact, abrogated the common-law rule.

Most of the State's brief is devoted to a lengthy exposition of this Court's ability to abrogate the common-law, the explicit words of the Wisconsin constitution notwithstanding, and the policy reasons why the year-and-a-day rule should be abolished.

Although this is all very interesting, and Defendant will respond to those arguments in the second section of this brief, none of those issues are necessary for resolution of this appeal.

Since the parties agree that the common-law, as accepted into Wisconsin law, barred Picotte's prosecution for murder, he is entitled to relief, even if the Court agrees with the remainder of the State's argument.

To do otherwise would subject Mr. Picotte to an *ex post facto* law in violation of Article I, Section 12 of the Wisconsin Constitution. *See, State v. Hobson*, 218 Wis.2d

350, 381, 577 N.W.2d 825, 838 (1998).[1] The State points out that after *Hobson* the U.S. Supreme Court rejected an *ex post facto* argument under the U.S. Constitution in similar circumstances in *Rogers v. Tennessee*, 532 U.S. 451 (2001). But the United States Supreme Court could not, and did not, construe the *Wisconsin* constitution in *Rogers*.

Obviously, the Wisconsin Supreme Court is "the final arbiter of questions arising under the Wisconsin Constitution," *Jensen v. Wisconsin Elections Bd.*, 2002 WI 13, ¶25, 639 N.W.2d 537, 544 (2002). It is equally well established that "the Wisconsin Constitution may afford greater protection than the United States Constitution." *State v. Hansford*, 219 Wis.2d 226, 242, 580 N.W.2d 171 (1998), and that only the Wisconsin Supreme Court has

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[1] Defendant acknowledges that the *Ex Post Facto* clause applies only to legislative enactments. But a defendant's due process rights prohibit the retroactive application of judicial decisions under an analysis identical to that under the *ex post facto* clauses of the state and federal constitutions. *See, State v. Kurzawa*, 180 Wis.2d 502, 510-511,509 N.W.2d 712, 715 (1994) (the principles underlying the *Ex Post Facto* Clause apply to judicial pronouncements as well as to legislative acts). *See also, Rogers v. Tennessee*, 532 U.S. 451, 456-457 (2001).

"the power to overrule, modify or withdraw language from a previous supreme court case." *Cook v. Cook*, 208 Wis.2d 166, 189, 560 N.W.2d 246 (1997). To the extent this case presents an issue of law and public policy, it must be resolved by the legislature or Supreme Court, and not this Court. *See Cook v. Cook*, 208 Wis.2d at 188-89 (explaining that primary function of court of appeals is error correcting and that primary function of supreme court is "law defining and law development").

In *Hobson*, the Wisconsin Supreme Court explicitly held that the Wisconsin Constitution prohibited the retroactive application of changes in common law defenses to the criminal defendant before the Court. That rule is binding on this Court, and thus Picotte's conviction must be reversed, even if the Court agrees with the remainder of the State's argument.

B. The Defendant Had a Constitutional Right to the Application of the Common-Law to His Case, and this Court Can Not Retroactively Abolish That Right.

Article XIV, Section 13 of the Wisconsin Constitution gives Mr. Picotte the constitutional right to the protection of the common law. Such protection can not be retroactively abrogated. As Justice Scalia's dissent in *Rogers* makes clear, the retroactive change in the common law violates a defendant's right to due process of law. *See, Rogers v. Tennessee*, 532 U.S. at 468-471 (*Scalia*, J., *dissenting*).

While Justice Scalia was writing for the four justice minority of the Court, there is a critical difference between *Rogers* and the instant case, which makes Justice Scalia's reasoning applicable here. Rogers had no statutory or state constitutional right to the application of common law. In that case the state court was operating entirely as a common law court, without any legislative or constitutional direction. *See, State v. Rogers*, 922 S.W.2d 393 (Tenn. 1999). Here, Picotte has a state constitutional right to the application of the common law, in the absence

of legislative action to abrogate such right. This is significant. In the majority opinion in *Rogers*, Justice O'Connor pointed out that the Tennessee court decision abrogating the common law rule "involve[d] not the interpretation of a statute but an act of common law judging." *Rogers*, 532 U.S. at 461. In the present case, the common law right arises directly from a state constitutional provision–not from "an act of common law judging."

Defendant is aware of no case in which this Court, or any other Court, has retroactively abrogated an acknowledged constitutional right. *State v. Esser*, 16 Wis.2d 567, 115 N.W.2d 505 (1962), the case primarily relied upon by the Attorney General, involved the *State* arguing that the common law should not be changed, while in *Hobson* the Court explicitly refused to apply the law retroactively to the defendant before the Court.

Thus, whatever the wisdom of the State's remaining arguments, it would violate Due Process of Law under both the state and federal constitutions to abrogate a state

constitutional right that existed at the time of the act and at the time of trial. Thus any abrogation of the common law can not be applied to Mr. Picotte.

II. A COURT CAN NOT ABROGATE A COMMON LAW RULE AFTER THE LEGISLATURE SPECIFICALLY REFUSES TO DO SO.

A. *Esser Was Wrongly Decided and Should Be Overruled.*

In *State v. Esser*, 16 Wis.2d 567, 115 N.W.2d 505 (1962) the Wisconsin Supreme Court decided that the definition of "insanity" in criminal cases was *not* part of the common which was accepted as Wisconsin law at the time of statehood. *See*, 16 Wis.2d at 573-579, 115 N.W.2d at 508-512. Nevertheless, the Court went on to reach the truly remarkable, and entirely unnecessary, conclusion that the unambiguous words of the State Constitution ("...until altered or suspended by the legislature...") did not mean what they say and that a Wisconsin court, in addition to the State Legislature, could abrogate the common-law. For authority to support such usurpation of

legislative authority, the Court cited general references and decisions of courts in other states which had no state constitutional provision comparable to the explicit Wisconsin constitutional provision which gives exclusive authority to the legislature to change the common law.

Should this case reach the Wisconsin Supreme Court, Picotte will argue that *Esser* should be overruled as wrongly decided. He understands, of course, that this Court is bound by *Esser*.

B. *Even Assuming a Wisconsin Court Can Abrogate a Common Law Rule, it Can Not Do So after the Legislature Has Explicitly Refused to Adopt Such a Change.*

At pages 8 and 9 of its brief, the State demonstrates that the Wisconsin legislature explicitly considered, and rejected as a matter of "policy," abrogation of the year and a day rule. The State now seeks from the judicial branch of government what it was denied by the legislative branch. This they can not do.

"When acting within constitutional limitations, the Legislature settles and declares the public policy of a state,

and not the court." *Hengel v. Hengel,* 122 Wis.2d 737, 742, 365 N.W.2d 16 (Wis. Ct. App.1985) *citing Borgnis v. Falk Co.,* 147 Wis. 327, 351, 133 N.W. 209 (1911). "The legislature, not the courts, determines the public policy of Wisconsin." *In re Commitment of Sorenson,* 2001 WI App 251 ¶41, 248 Wis.2d 237, 635 N.W.2d 787, 796 (Wis. Ct. App. 2001), *citing, Rice v. City of Oshkosh,* 148 Wis.2d 78, 91, 435 N.W.2d 252 (1989).

Here, the Wisconsin legislature has decided the policy question, and this Court can not second guess the legislative branch. *See Cook v. Industrial Comm'n,* 31 Wis.2d 232, 243, 142 N.W.2d 827 (1966) (failure of legislature to pass bill indicated legislative intent that the alternative interpretation governs).

In *Ross v. Ebert,* 275 Wis. 523, 82 N.W.2d 315 (1957) the Wisconsin Supreme Court was confronted with a labor union that barred Negroes from membership. The Legislature had adopted a statute which discouraged racial discrimination under such circumstances, but provided no remedy to those denied membership because of race.

Excluded union applicants sought a remedy from the Supreme Court. The Court observed that in the original bill the Industrial Commission was given the power to order violators to cease and desist and gave the courts power to review and to enforce such orders. However, those provisions were deleted from the bill that ultimately passed, and efforts to include such enforcement mechanisms were defeated in subsequent legislative sessions, *Ross*, 275 Wis. at 529, 82 N.W.2d at 318-319.

The plaintiffs in *Ross* asked the courts to provided them the relief that was explicitly stricken by the legislature. The Supreme Court responded to this request as follows:

> We are convinced that the legislature purposely denied enforcement provisions in the Fair Employment Code and for us to restore what the legislature struck out would be legislation not interpretation or construction of the statute. And here there could be no pretense that the court is reading into the statute something consonant with the intent of the legislature but left out through inadvertence or lack of foresight. The statute's history up to the last legislative session emphasizes that there is more to contend with here than an inadvertent omission. The principle of compelling compliance with the purpose of the legislation has been three times intentionally rejected. A clearer declaration of a non-compulsory public policy is hard to imagine. For the court to read into the statute that

> which the legislature has thrice refused to include would be not only a reversal of the legislative intent but a gross invasion of the legislative field in order to do so.

Ross, 275 Wis. at 529-530, 82 N.W.2d 319.

That is exactly what the Attorney General asks this Court to do in this case. The legislature considered, and rejected, abrogation of the year and a day rule. Thus this case differs significantly from either *Esser* or *Hobson* in which no such legislative action was involved. If a Wisconsin court is now free to ignore what the legislature did, to make its own policy findings, and to take the precise action the legislature declined to take, the judicial branch would be setting itself up as a super legislature. As the Wisconsin Supreme Court has said:

> We may differ with the legislature's choices...but must never rest our decision on that basis lest we become no more than a super-legislature. Our form of government provides for one legislature, not two. It is for the legislature to make policy choices, ours to judge them based not on our preference but on legal principles and constitutional authority. The question is not what policy we prefer, but whether the legislature's choice is consistent with constitutional restraints.

Flynn v. Department of Administration, 216 Wis.2d 521, 528-529, 576 N.W.2d 245 (1998). A court can not "say if

the legislature knew then what we know now, they would have done differently, and proceed to substitute such different law for the one actually enacted by the legislature." *Dickhut v. Norton*, 45 Wis.2d 389, 403, 173 N.W.2d 297, 304 (1970).

Defendant readily concedes that the Wisconsin Legislature could prospectively abrogate the common law rule prohibiting the prosecution for homicide which occurs more than a year and a day after the act. But, the point is, that legislature has refused to do so. For this Court to now step in to abrogate the common law would be an improper exercise of judicial power and would be inconsistent with the separation of powers between the legislative and judicial branches of government. If the Attorney General feels strongly about this issue, or if a legislator reads the Court's decision in this case vacating Mr. Picotte's conviction, those policy issues can be debated and the statutes can be amended. This appeal, in this Court, is neither the time nor the place for such a debate.

Waylon Picotte is entitled to the protection of the

common law and the protection of the Wisconsin Constitution, and his conviction must be set aside for that reason.

CONCLUSION

For all of the foregoing reasons, Waylon Picotte asks that the judgment and order of the Circuit Court of Brown County be reversed and cause remanded with directions to dismiss the homicide information with prejudice and to credit Picotte's aggravated battery sentence with all of the time served on the homicide conviction.

Respectfully submitted,

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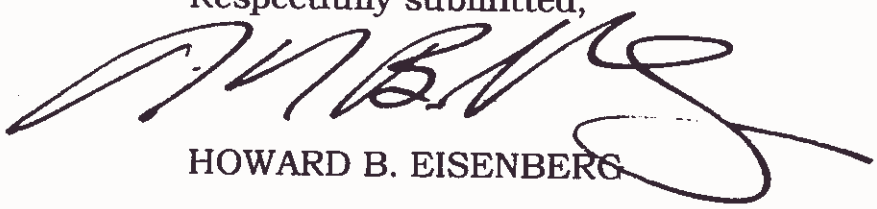
HBE
March 16, 2002

CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced by a proportional serif font. The length of this Brief is 2,188 words.

Dated: 3/16/02

Respectfully submitted,



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